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ABSTRACT

Twelve papers from the 1982 conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions are presented. Following an introduction by Joel M. Douglas, the following papers and authors are presented: "Campus Bargaining and the Law: A Decade of Higher Education Collective Bargaining--1972-1982" (June M. Weisberger); "The Theory of Negotiation: Getting to Yes" (Roger Fisher); "Dissecting the New Right and Its Threat to Collective Bargaining" (Roxanne Bradshaw); "The Impact of Unions on Academic Standards and Accreditation in Higher Education" (Thomas Shipka); "The Industrial Model of Academic Collective Bargaining" (Michael B. Lehmann); "The Use and Abuse of Part-Timers--I: Casual Employees--Scabs or Saviors?" (Nancy L. Hodes); "The Use and Abuse of Part-Timers--II" (Nuala McGann Drescher); "Managerial Discretion, Financial Exigency and Reduction in Force: The Experience in New Jersey's Public, Two-Year Colleges" (Ernest Gross, Theodore Settle, James Begin); "Academic Freedom in Canada in the 1980's" (V. W. Sim); "A Decade of Campus Bargaining: An Overview" (Kenneth P. Mortimer); "The National Center for the Study of Collective Bargaining in Higher Education: The First Ten Years--Parts I and II" (Joel M. Douglas and Aaron Levenstein). (SW)

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CAMPUS BARGAINING AT THE CROSSROADS

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Proceedings
Tenth Annual Conference
April 1982

JOEL M. DOUGLAS, *Editor*

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National Center for the Study of
Collective Bargaining in Higher Education
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TABLE OF CONTENTS

1. INTRODUCTION 1
Joel M. Douglas

2. CAMPUS BARGAINING AND THE LAW: A DECADE OF HIGHER EDUCATION COLLECTIVE BARGAINING--1972-1982. 7
June M. Weisberger

3. THE THEORY OF NEGOTIATION: GETTING TO YES 18
Roger Fisher

4. DISSECTING THE NEW RIGHT AND ITS THREAT TO COLLECTIVE BARGAINING 25
Roxanne Bradshaw

5. THE IMPACT OF UNIONS ON ACADEMIC STANDARDS AND ACCREDITATION IN HIGHER EDUCATION 33
Thomas Shipka

6. THE INDUSTRIAL MODEL OF ACADEMIC COLLECTIVE BARGAINING.. 48
Michael B. Lehmann

7. THE USE AND ABUSE OF PART-TIMERS--I: CASUAL EMPLOYEES - SCALS OR SAVIORS? 56
Nancy L. Hodes

8. THE USE AND ABUSE OF PART-TIMERS--II 65
Nuala McGann Drescher

9. MANAGERIAL DISCRETION, FINANCIAL EXIGENCY AND REDUCTION IN FORCE: THE EXPERIENCE IN NEW JERSEY'S PUBLIC, TWO-YEAR COLLEGES 73
Ernest Gross
Theodore Settle
James Begin

10. ACADEMIC FREEDOM IN CANADA IN THE 1980's 83
V. W. Sim

11. A DECADE OF CAMPUS BARGAINING: AN OVERVIEW 97
Kenneth P. Mortimer

12. THE NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION: THE FIRST TEN YEARS--PART I ... 107
Joel M. Douglas

13. THE NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION: THE FIRST TEN YEARS--PART II... 113

CAMPUS BARGAINING AT THE CROSSROADS

1. INTRODUCTION

The Decennium Conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions was a milestone for both Baruch College as well as those engaged in academic collective bargaining. Ten years ago, when the Center was first established, there were those who expressed doubt as to the viability of an organization devoted to what was described as a 'unique phenomena'. Today, nearly 200,000 professors live under collective bargaining agreements. Additionally, thousands of non-professional employees in colleges and universities are also unionized. Clearly, this 'unique phenomenon' has grown; it is the rare institution that is not involved in some facet of academic labor relations.

The previous ten years have not been easy for the Center. Financial constraints, budgetary problems, the shifting legal environment, maintenance of a neutral base and other assorted problems have had to be overcome. Much of the credit for our success must be given to the three previous Directors, Maurice Benewitz, Tom Mannix and Ted Lang. Aaron Levenstein, who served as Associate Director during the tenure of the past two Directors, must receive a special word of thanks. Two other people must be singled out for making the Center what it is today: Evan G. Mitchell, for having run ten annual conferences and for treating each one with the same enthusiasm that she gave the first; and Ruby N. Hill, who has been Secretary to the last three Directors.

Design of the Conference

Taking stock of the events of the past decade was the focal point of the Decennium Conference. The first plenary session reviewed the major legal decisions of the past decade. The second session focused on the impact that the expansion of collective bargaining has had on university campuses, with particular emphasis on campus governance. These two sessions provided a setting for an examination of current critical issues that campus bargainers face. Among these were the attack on academic freedom, the use and abuse of part-timers, and the relationship between unionization and the quality of academic standards.

Yeshiva was the theme of the Monday luncheon, however, in accordance with the wishes of the speaker, the remarks were off the record and therefore not a part of this proceeding. The speaker, a member of the National Labor Relations Board, was in the delicate position of having ruled on a series of Yeshiva cases that were due out the week after the conference.

The Program

Suggestions for topics and speakers were obtained from the Faculty and National Advisory Committees of the Center. Furthermore, there now exists an informal group known as "friends of the Center" who frequently submit suggestions for papers and research proposals. To these three groups go the credit for the continued success of the program.

Monday Morning, April 26, 1982

9:00 INTRODUCTION
Joel M. Douglas, Director, NCSCBHEP

WELCOME
Joel Segall, President, Baruch College, CUNY

9:30 PLENARY SESSION I
CAMPUS BARGAINING AND THE LAW

Speaker: June M. Weisberger, Professor of Law, University of Wisconsin Law School

Moderator: Aaron Levenstein, Professor Emeritus Baruch College, CUNY, Former Assoc. Dir., NCSCBHEP

11:00 PLENARY SESSION II
GETTING TO YES: THE THEORY OF NEGOTIATION

Speaker: Roger Fisher, Professor of Law, Harvard Law School, Dir., Harvard University Negotiations Projects

Discussant: Arnold Cantor, Executive Director, Professional Staff Congress/AFT

Moderator: Frederick Lane, Professor of Public Administration, Baruch College, CUNY

12:45 LUNCHEON

Topic: THE NATIONAL LABOR RELATIONS BOARD: ITS IMPACT ON CAMPUS BARGAINING

Speaker: Donald Zimmerman, Member, National Labor Relations Board

Presiding: Joel M. Douglas, Director, NCSCBHEP

Monday Afternoon, April 26, 1982

2:30 SMALL GROUP SESSIONS

Group A: DISSECTING THE NEW RIGHT AND ITS THREAT TO COLLECTIVE BARGAINING

Speaker: Roxanne Bradshaw, Chairperson, NEA Higher Education Council

Discussant: Dorrit Cowan, Assistant Professor of Speech Baruch College, CUNY

Moderator: Julius Manson, Professor Emeritus, Baruch College, CUNY

Group B: ACADEMIC STANDARDS AND ACCREDITATION

Speaker: Thomas Shipka, Professor of Philosophy President, YSU Chapter of OEA, Youngstown State University

Discussant: Margaret K. Chandler, Professor of Business, Columbia University

Moderator: Frances K. Barasch, Professor of English, Chairperson, Baruch Chapter PSC/AFT

Group C: THE INDUSTRIAL MODEL OF ACADEMIC COLLECTIVE BARGAINING

Speaker: Michael B. Lehmann Professor of Economics, University of San Francisco

Discussant: Stephen L. Finner, Director, Northeast Region AAUP

Moderator: Bernard Mintz, Executive Assistant to the President, William Paterson College of New Jersey

Tuesday Morning, April 27, 1982

9:00 SMALL GROUP SESSIONS

Group D: THE USE AND ABUSE OF PART-TIMERS

Speakers: Nancy Hodes, Deputy Director for Management/Confidential Affairs, NYS Governor's Office of Employee Relations

Nuala McGann Drescher, President United University Professions

Moderator: Samuel Ranhand, Professor of Management Baruch College, CUNY

Group E: MANAGERIAL DISCRETION, FINANCIAL EXIGENCY AND REDUCTION IN FORCE

Speakers: James Begin, Director, Institute for Management and Labor Relations, Rutgers University

Ernest Gross, Associate Director, Institute for Management and Labor Relations, Rutgers University

Theodore Settle, Assistant Professor, Institute for Management and Labor Relations, Rutgers University

Moderator: David Newton, Vice Chancellor
Long Island University

Group F: WHATEVER HAPPENED TO ACADEMIC FREEDOM?

Speaker: Victor W. Sim, Associate Executive Secretary, CAUT

Discussant: Joyce Barrett, Esq., Baruch College PSC/CUNY Office of Legal Affairs

Moderator: Esther Liebert, Assistant to the President, Faculty and Staff Affairs, Baruch College, CUNY

11:00 PLENARY SESSION III
A DECADE OF CAMPUS BARGAINING

Speaker: Kenneth P. Mortimer, Professor of Higher Education, Pennsylvania State University

Discussant: Gene Maeroff, Education Writer, New York Times

Moderator: Robert T. Simmelkjaer, Dean, School of General Studies, City College of New York, CUNY

1:00 LUNCHEON SYMPOSIUM

PERSPECTIVES: THE STATE OF THE ART -- THEN AND NOW

Speakers: Joel M. Douglas, Director, NCSCBHEP

Theodore H. Lang, Professor of Education, Baruch College, CUNY, Former Dir., NCSCBHE

Aaron Levenstein, Professor Emeritus Baruch College, CUNY, Former Assoc., Dir., NCSCBHEP

Thomas Mannix, Director of Collective Bargaining Services, University of California Systemwide, Former Acting Dir., NCSCBHE

3:30 SUMMATION
Joel M. Douglas

A Word About the National Center

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges universities. Operating on the campus of Baruch College, City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- The two-day Annual Spring Conference
- Publication of the proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an Annual Directory of Faculty Contracts and Bargaining Agents.
- Bibliography of Collective Bargaining in Higher Education.
- The National Center Newsletter, issued five times a year, providing in depth analysis of trends, current developments major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.

- Monographs - complete coverage of a major problem or area, sometimes of book length.

- Regional workshops, using a hands-on format to provide training in subjects like negotiating a contract, grievance-processing and arbitration, implementation and administration of contracts.

- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, and important books and relevant research reports.

- BRAIN (Baruch Retrieval of Automated Information for Negotiations), a Contract Data Bank maintained jointly with McGill University, providing for retrieval and analysis of specific clauses.

- Depository of arbitration awards in higher education, housed at the National Center and established with the cooperation of the American Arbitration Association.

Acknowledgments

The Proceedings of the Annual Conference continue to be viewed as an update on the state-of-the art in academic collective bargaining. We at the Center are proud of the acceptability that this publication has received. The staff of the National Center deserve full credit for the preparation of this publication. The speeches were transcribed by Isabel Gonzalez. The proofing was coordinated by Ruby N. Hill, assisting her were Carol Rosenberg and Lorraine DeBona, graduate assistants of the National Center and Lisa Flanzraich, librarian of the National Center. As she has done since the inception of the National Center, Evan G. Mitchell suprvised the entire project from start to finish. The Baruch Word Processing Center assisted in manuscript production. To all of the above, I am indeed thankful.

-J.M.D.

2. CAMPUS BARGAINING AND THE LAW: A DECADE OF HIGHER EDUCATION COLLECTIVE BARGAINING - 1972-1982

June M. Weisberger
Professor of Law
University of Wisconsin Law School

As any serious observer of the higher education academic collective bargaining scene today knows, this area of labor relations law is the most complex. It is most complex because it requires knowledge of both the traditional and the rapidly changing higher education academic setting as well as general and specific labor relations law under the National Labor Relations Act as amended. It also requires knowledge of the patchwork quilt of state statutes and judicial and administrative agency decisions governing public sector labor relations in a number of different jurisdictions. In addition, a knowledgeable practictioner in this area should also be aware of the patchwork quilt of other but very important related developments under Title VII, under the Equal Pay Act, and even under a constitutional law analysis, where appropriate. All these areas are not part of traditional labor relations law, but they affect both directly and indirectly the general area of employment relationships in higher education. Major labor relations-legal developments of the past decade and themes affecting higher education faculty will be viewed in the following pages not in technical legal terms, such as specific representational or scope of bargaining decisions, but in very broad terms. Five topics containing relevant labor relations and employment law information will be discussed below.

I

The first topic involves student participation in faculty collective bargaining in higher education and the developing statutory law. In the early seventies there were certain experiments by agreement of the parties involving student participation in various ways during faculty-university collective bargaining. The most well-publicized experiment took place at several Massachusetts state universities resulting in several innovative and interesting state statutory schemes. Starting first in Montana in 1975 and continuing in Oregon, Maine and Florida, there are now four different statutory models[1] concerning student participation in some fashion at the collective bargaining table. Montana, the first attempt, produced a bill that received support from not only the Montana student body lobby, the AFT, but eventually the state higher education commission. In the Montana scheme, student participated in the management caucus as well as being permitted by statute to act as observers at the collective bargaining table.

The next statutory experiment was that enacted in Oregon in 1975. This legislation is perhaps the most perplexing because under Oregon state statute student representatives are permitted "to comment in good faith during the bargaining sessions on matters under consideration" and are allowed "to meet and confer" (the phrase used in the NLRA to mean bargain collectively) with the exclusive faculty representative and the public employer regarding the terms of any agreement between them prior to execution of a written agreement incorporating

the parties' understandings.

In 1977, Florida gave students the right to comment to both parties and to the public during negotiations regarding the impact on the "educational environment," the phrase used in the legislation. Also, students were permitted "to participate in good faith" during all negotiations.

In 1979, the Maine Legislature provided for student representatives to meet and confer with university bargainers during the negotiations and with both parties prior to bargaining.

These various experiments have not found widespread support elsewhere yet and, therefore, many may think that this is an interesting development but one of academic interest only. I suggest that this topic may be one where there may be renewed legislative interest. While there is no widespread movement yet to follow the four jurisdictions where statutes have been enacted giving a statutory role to student representatives during faculty bargaining, rapidly escalating student costs may renew student interest and thus pressure on legislatures for additional experiments in other jurisdictions that either parallel or deviate in some interesting way from these first four models.

If there are to be additional legislative experiments and a following of the pattern in part or in whole of these four jurisdictions, additional issues will have to be dealt with in the legislation. There are already interesting variations in the four jurisdictions not only as to the roles of the student representatives, but also 1) how student representatives are chosen, 2) what access students will have to documents exchanged by the parties during collective bargaining and during any impasse procedures, and 3) the important question of confidentiality of the collective bargaining process.

II

The second topic to be addressed has just recently gained attention. It has to do with tenure review deliberations and votes by faculty. The question specifically is, "Is there an academic freedom privilege which will insulate the decision making process when the decision is challenged in a variety of forums and the vote of the participants is alleged to be a critical element of a complainant's case?" So far the law has given us no clear-cut answer. We have two very different approaches demonstrated by two federal courts in 1981. The cases involve the City University of New York[2], on the one hand, and the University of Georgia,[3] on the other.

In the New York case, the plaintiff was denied reappointment with tenure by one of the community colleges within the City University of New York system. It was alleged that this action was based upon unconstitutional race discrimination. During discovery, the complainant sought the votes of two named defendants in the peer review process which led to that adverse tenure decision. The individual defendants refused to answer citing an academic freedom privilege. The

court upheld the asserted privilege that was put forth by the defendants noting that academic freedom, in the judgment of that court, is a transcendent value which encompasses the concept of peer review by secret ballot. Thus, the decision is isolated from improper pressures. In addition, the court said that equivalent evidence might be had in other ways so as not to reveal the voting. Societal interest in protecting the secret ballot, in that court's judgment, outweighed the complainant's right to discover the individual votes of the two named defendants.

In another case involving somewhat similar circumstances, the trial court and the appellate court went in different directions. In the case involving the University of Georgia, the plaintiff alleged Title VII sex discrimination in the decision of the University not to promote her to an associate professorship. During pre-trial activities to depose various other participants in the tenure decision vote, Professor Dinnan refused to divulge his vote in that review process. Upon motion, the court attempted to compel his testimony and he again refused. He was cited for contempt and jailed. The Fifth Circuit Court of Appeals affirmed the trial court's finding that Professor Dinnan was indeed in contempt of court. It concluded that society's value in discovering the truth outweighed the privilege that the defendant attempted to assert in his particular case. It rejected the type of analysis that the New York federal district court engaged in the City University of New York case.

Given these two diverse answers to this particular problem area of conflicting societal values, this question will no doubt be repeatedly litigated until some more definitive answer is given to this perplexing balancing problem arising under the Constitution, under Title VII, or under various other forms of protective legislation. The required balancing processing is certainly not an easy one to resolve on the merits or to predict the eventual outcome.

III

The third area identified as a major and troublesome one of legal developments during the past decade involves the question of financial exigency and the courts. It is clearly an area of increasing concern as fiscal problems and constraints become more and more pressing for a large number of academic institutions. Specifically, the post-Bloomfield College developments[4] have been studied to see what light has been shed upon the problem of how courts will approach tenured faculty layoffs in the context of a university's argument of financial exigency.

Over the past ten years, shrinking financial resources of universities have threatened the traditional institution of faculty tenure. The main legal questions are: 1) Under the circumstances does financial exigency exist? and 2) What is the proper role of the courts in judging the existence of financial exigency? In this critical area, the developing case law provides answers.

First, it is known from the case law that the financial

exigency must be a bona fide one. If almost immediately following the layoff or discharge of tenured faculty new faculty or replacements are hired, the financial exigency defense of the university or college will be seriously questioned. If there are related developments that do not go directly to financial exigency but appear to be an attack on the basic institution of tenure, the financial exigency claimed by the institution of higher education will be viewed as something less than bona fide. (One example is the one-year terminal contract that the Bloomfield College administration attempted to impose on other faculty members.) As a result of the appellate court decision in Bloomfield College and other cases, it is also known that a court will probably not view specific financial decisions of university decision-makers as a critical determinant in whether there is a bona fide financial exigency.

It is known what type of evidence courts have been particularly impressed with in determining whether a bona fide decision of financial exigency has been made. For example, several cases specifically mention testimony documenting declining enrollment or specific evidence of recurring operating deficits.

There is another interesting, and as yet unresolved question. In looking at evidence of recurring operational deficits, is the appropriate universe the entire university structure or may proof of operating deficits relating only to one program or one department be sufficient to prove that a bona fide financial exigency exists?

There are also some constitutional dimensions in this area of the law that have produced some interesting judicial decisions. One obvious conclusion to be drawn is that a decision finding financial exigency cannot be used as a pretext for violating a constitutional right (or a statutory or contractual right.)

Other constitutional developments relate to the procedural due process that may be required in deciding which faculty to lay off once the determination of bona fide financial exigency has been made. In an interesting case in the Western District of Wisconsin, Johnson v. Board of Regents of the University of Wisconsin System,[5] Judge James E. Doyle gave a very interesting analysis and set forth guidelines for certain minimal procedural due process rights that faculty members have in what he characterized as a non-adversarial setting. As the decision indicates, these are not full due process, adversarial hearing rights which traditionally would include cross examination, etc. In addition, there are minimum standards of equity that certain courts have pointed to requiring "uniform procedures" with "reasonable standards" to determine which faculty to lay off.

There is a related and interesting question in the financial exigency, lay-off area as to whether a university has an obligation to make feasible efforts to find the adversely affected tenured faculty member alternative employment. This approach, imposing upon the university an additional burden not only to prove the bona fideness of the financial exigency but to take affirmative action to provide alternative employment,

is a concept developing apart from express contractual obligations. It has not found judicial support but, I suggest, that there might very well be additional cases brought to pressure the parties to have this type of affirmative action incorporated explicitly or implicitly in lay off procedures.

There is currently a debate going on as reported in the Chronicle of Higher Education.[6] These news stories concern whether university decision makers have a broad power to lay off tenured faculty when there is no financial exigency but when management believes programmatic changes are desirable in a whole variety of circumstances. Courts may increasingly be willing to define financial exigency broadly and to accept a wide variety of evidence and proof of what is a financial exigency. As to whether the courts will go beyond this, however, and define financial exigency to include programmatic changes as a basis for laying off tenured faculty, requires a big judicial leap. That leap will only be taken where the programmatic changes are not solely a result of a management decision to change the direction of the enterprise but a decision reflecting faculty input, perhaps in the form of a faculty study and review committee recommendation. The articles of the Chronicle of Higher Education indicate this to be highly controverted area. Laying off of tenured faculty for programmatic changes in contrast to a financial exigency argument (even one very broadly or liberally defined) is a new legal argument and one, that courts will look at very thoughtfully and with hesitation.

IV

The fourth legal area is one concerning judicial reluctance to intrude on the academic decision making process and how courts should handle "mixed motive," adverse personnel decisions.

Over the past decade many courts have frequently expressed their desire to leave tenure and other personnel decisions involving higher education faculty untouched despite challenges based upon allegations of discrimination, interference with protected activities or contract violation. Courts have been very ready to acknowledge their lack of qualifications to make these decisions and initially at least accorded significant weight and value to the academic peer review process by which these decisions are made.

The most often cited case demonstrating extreme judicial reluctance to interfere with the peer review process is Faro v New York University[7], a 1974 Second Circuit Court of Appeals decision. The reluctance demonstrated by the court in Faro and by other courts in other decisions suggests that in the academic higher education setting, normal rules governing constitutional challenges, statutory discrimination and appropriate remedies might have different outcomes. Indeed that has been the trend of cases decided at the beginning of the decade under study.

The current trend, however, appears to modify that early reluctance by courts to interfere with academic decision making. Relatively recently the Second Circuit, the same court

that decided Faro, had this to say: "We fear, however, that the common-sense position we took in Faro, namely that courts must be ever mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964." This quotation comes from a Title VII discrimination case involving Syracuse University[8] and is an express acknowledgement by the Second Circuit that its earlier statement giving heavy weight to the academic peer review process due to the special competence of institutions of higher education (and not courts) seriously influenced a number of judicial decisions following the Faro decision.

There has been a decided reluctance to grant tenure as an appropriate remedy for various kinds of violations of constitutional or statutory law in academic settings. In a recent case involving Muhlenberg College,[9] however, the court demonstrated no such reluctance where the faculty review committee had recommended tenure but that tenure decision recommendation by the committee had not been implemented by the administration. Admittedly, this is not a difficult case in which to grant tenure as an appropriate remedy. However, it is clearly a step away from that earlier reluctance to interfere in any way with the academic decision making processes of higher education.

Similarly, in "mixed motive" cases where adverse personnel decisions have been made and the plaintiff or complainant alleges that a "bad" or impermissable reason was the basis for the decision while the institution defends by pointing to a bona fide reason, institutions are at least required to articulate a permissible reason. There are several pronouncements by the United States Supreme Court in the context of mixed motives cases. They also reflect some backing away from earlier, heavy deference accorded to institutions of higher education in their personnel judgments. Two cases decided by the Supreme Court, Mount Healthy City School District v. Doyle,[10] a public school case, and Keene State University v. Sweeney,[11] a higher education case are relevant. In Mount Healthy, there is some formulation of how courts should handle cases where either the allegation is made that the reason given by the university is a pretext for prohibited or improper decision making or several reasons contributed to the adverse decision and at least one was improper.

In Mount Healthy the Supreme Court tells the parties that the plaintiff must initially show that the improper consideration was the motivating factor for the higher education institutions' adverse personnel decision. Then the burden to produce additional evidence (but not the burden of persuasion) shifts. At that point, the institution of higher education has to demonstrate that the same decision would have been made in the absence of the protected (constitutional, statutory or contractual) activity. There are some who believe that in the higher education setting the Mount Healthy analysis (where the burden is first allocated to the plaintiff or the complainant to make a prima facie case and then shifts to the institution to defend the action by producing proof that that same decision would have been made even if the improper motive had not been part of the picture) has been changed by the 1978 United States Supreme Court decision in Board of Trustees of

Keene State College v. Sweeney.

It has been suggested that a very careful reading of the per curiam decision does not change the Mount Healthy analysis and that Mount Healthy is alive and well whether you are talking about an adverse personnel decision by a public school system, by a municipality or by an institution of higher education. The Supreme Court's per curaim decision stated: "while words such as 'articulate,' 'show', and 'prove' may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely 'articulating some legitimate nondiscriminatory reason' and 'proving absence of discriminatory movtive'." The Supreme Court majority is quite clear that the employer does not have to prove the absence of discriminatory motive. The required articulation of "some legitimate nondiscriminatory reason" does not negate Mount Healthy's holding that the employer must produce evidence to indicate that the same decision would have been reached even in the absence of the alleged improper reason.

For those interested in developing law under the National Labor Relations Act, there is another indication that Mount Healthy with its allocation of burdens in mixed motive and pretext cases is alive and well. In its 1980 decision in Wright Line,[12] the NLRB in the context of interpreting the National Labor Relations Act held that where an employee is allegedly fired because of his or her protected activities under the NLRA and the employer claims that the firing was for some legitimate reasons, a Mount Healthy analysis is appropriate.

V

The last area to be discussed is very different from the four already noted. It concerns developments following the United States Supreme Court decision in Abood v. Detroit Board of Education.[13] More specifically, agency shop fees or fair share fees may be charged to members of the bargaining unit who do not belong to the exclusive bargaining representative. This area is just beginning to be explored in great detail and is one that has a great deal of significance not only to the individual employee but also concerns exclusive bargaining agents who depend upon revenues coming from agency shop or fair share agreements. It also is of concern to employers who are certainly affected by legal developments in this area.

In Abood, the Supreme Court applied, in the public sector context, already developed private sector labor law concepts and upheld a statutory provision relating to Michigan public employers which permitted an agreement between a public employer and union requiring non-members of the bargaining unit to pay for services relating to the union's collective bargaining and contract administration functions. The challengers claimed that their consitutional rights of free speech and free association were infringed upon when as employees they were required to make payments under their bargaining agreements for union services. Looking at the public policy issue, the Supreme Court majority held that public employees are similar to private sector employees, although there may be significant differences between public

employers and private sector employers. The Court emphasized employee similarity and agreed with the unions that "free riders" should not be permitted in the public sector any more than they are permitted in the private sector. Since all members of the bargaining unit under a statutory scheme of exclusivity receive the benefits which flow from the exclusive bargaining agent's activities at the bargaining table and during contract administration, all members of the bargaining unit may be required to pay for these services.

If all bargaining unit members may be required to pay for a union's collective bargaining and contract administration services, but not for political or ideological causes supported by the union, where is this critical line to be drawn? What is a permissible union activity which every bargaining unit member may be required to pay for and what falls on the other side where only voluntary contributions may be expended? There has been surprisingly little helpful litigation in the private sector pre-Abood. Post-Abood, two very different approaches have been developed. In a case involving the Communication Workers of America and members of a bargaining unit who objected to many union expenditures, a master appointed by a federal district court in Maryland recommended that 81% of the union dues already paid be rebated to objectors.[14] Two aspects of this decision should be noted.

First, the master believed that collective bargaining and contract administration services should be defined very narrowly. Therefore, there should be a significant rebate to objecting bargaining unit members. Further, the master found insufficient evidence to permit an apportionment for time spent by the union staff members in activities directly related to contract administration and collective bargaining for which all may be required to pay and other activities for which non-members of the union could not be charged. Because of apportionment difficulties, most expenditures for union staff were subject to the rebate procedure. Thus there were two reasons for recommending the large rebate. This case has recently been remanded again to the master for further findings so the ultimate outcome is uncertain.

In a very different decision. Donald Wollett served as arbitrator in a case involving the State University of New York and the exclusive bargaining agent for the university faculty and determined that the correct refund was $.07.[15]

Perhaps the most instructive decision to date which attempts to distinguish systematically among various types of union activities in the context of fair share or agency shop fee litigation is one issued about a year ago by the Wisconsin Employment Relations Commission. The case is Browne v. Milwaukee Board of Education.[16] Although this is a public school case, it is relevant for both private and public institutions of higher education. Browne was initially decided on constitutional grounds by the Wisconsin Supreme Court which took an Abood approach holding that it was constitutionally permissible for the Wisconsin legislature to permit "fair share" or agency shop clauses if municipal employers agree. In this case, the Milwaukee Board or Education agreed to a fair share clause. Objectors filed lawsuit claiming their constitutional rights were infringed upon, using the same type of arguments raised in Abood. The Wisconsin Supreme Court,

after finding that the statute was constitutional on its face, remanded the case to the WERC, the state agency with jurisdiction over public sector labor relations in Wisconsin. In prehearing informal meetings, the parties to the litigation agreed that the WERC should look at this case in two stages.

The February 1981 decision of the WERC relates to stage one only. In its decision, the WERC addressed 31 areas of union expenditures specifically enumerated and agreed upon by the parties. Because of the importance of these categories, a detailed reading of this decision is worthwhile for those particularly interested in this problem area. To give some idea of the questions that were before the Wisconsin Employment Relations Commission, these are some examples of the areas discussed in this frontier decision: organizing bargaining units in which the complainants were not employed and seeking representation rights in units not represented by the respondent union, including units where there is an exisiting exclusive bargaining agent. The WERC found that these were appropriate activities to be financed by all members of the bargaining unit.

Other examples of activity where all members of the bargaining unit, not just union members, may be required to pay: defending respondent unions against efforts of other unions or organizing committees to gain representation rights in the units represented by the respondent unions; participating in proceedings regarding jurisdictional disputes under the AFL-CIO constitution; lobbying for collective bargaining legislation or regulations or to effect changes in or lobbying for legislation or regulations affecting wages, hours and working conditions of employees generally before Congress, state legislatures, and state and federal agencies. Also, fair share agreements may require all bargaining unit members to support and pay affiliation fees to other labor organizations that do not negotiate collective bargaining agreements governing the complainants' employment to the extent that such support and fees relate to the representational interests of unions in the collective bargaining process and contract administration.

The list goes on and includes publishing newsletters, holding membership meetings and conventions which relate to the representational interest in the collective bargaining process and contract administration.

Finally it is interesting to note two additional items in this extensive list of activities where non-members may be required to pay: lawful impasse procedures to resolve disputes arising in collective bargaining and in the enforcement of collective bargaining agreements and the prosecution or defense of litigation or charges to enforce rights relating to concerted activity, collective bargaining, and collective bargaining agreements.

Some examples of activities which the WERC believes should be financed only by union members include: training and voter registration, get-out-the-vote, and campaign techniques; supporting and contributing to charitable organizations, political organizations, and candidates to public office;

ideological causes and international affairs; public advertising on matters not relating to the representational interest in the collective bargaining process and contract administration; purchasing books and services, paying for technical services and lobbying when not related to the representational function. Because of its comprehensive approach, this WERC decision will be given significant weight in the decision making process elsewhere.

Conclusion

Reviewing the list of five topics, one finds, of course, some important omissions. Perhaps the two most notable relate to the duty of fair representation and age discrimination, both topics which are foreseen as critical areas which will concern unions, adminstrations and individual employees during the next decade. Several cases already decided in the past decade have at least identified problems in these areas and give some indication of the direction of the developing law.

Of course, the above listed five topics clearly indicate a highly subjective selection. The choices may seem unusual to many but, they serve to underscore the general theme that a labor relations practice today, whether it be engaged in by lawyers or by non-lawyers, requires the practitioner to view broadly his or her substantive interests and functions. Any ten-year retrospective approach would be severely defective unless it emphasized this point.

Footnotes

1. Mont. Code Ann. 39-31-302 (1979) 1975; Or. Laws ch. 679; Me. Rev. Stat. Ann. tit. 26, 1024-A(6) (Supp. 1982-83); Fla. Stat. Ann. 447.301 (West 1981).

2. Gray v. Board of Higher Education, 92 F.R.D. 87 (S.D.N.Y. 1981).

3. In re Dinnan, 661 F.2d 426 (5th Cir. 1981), cert. denied, (U.S. June 7, 1982) (No. 81-1714).

4. AAUP v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (1974), aff'd, 136 N.J. Super. 442, 346 A.2d 615 (1975). See also Browzin v. Catholic University, 527 F.2d 843 (D.C. Cir. 1975); Scheuver v. Creighton University, 199 Neb. 618, 260 N.W.2d 595 (1977); Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978).

5. Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), aff'd, 510 F.2d 975 (7th Cir. 1975).

6. Chron. of Higher Ed., March 17, 1982 at 1, Col. 2; Chron. of Higher Ed., March 31, 1982 at 1, Col. 2.

7. Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974).

8. Powell v. Syracuse University, 580 F.2d 1229 (2d Cir. 1978), cert. denied, 439 U.S. 984 (1978).

9. Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980).

10. Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977). See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

11. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

12. Wright Line, 251 N.L.R.B. 1083, 105 L.R.R.M. 1169 (1980).

13. Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

14. Beck v. Communication Workers of America, 468 F. Supp. 87, 93 (D. Md. 1979); Beck v. Communication Workers, 106 L.R.R.M. 2323 (D. Md. 1981) (ordering remand).

15. "Arbitrator Finds UUP Did Not Expend Extra Monies for Outside Activities," 878 Gov't Empl. Rel. Rep. (BNA) 22 (Sept. 8, 1980).

16. Browne v. Milwaukee Board of School Directors, WERC Dec. No. 18408 (February 3, 1981). See also 83 Wis. 2d 316, 265 N.W. 2d 559 (1977).

3. THE THEORY OF NEGOTIATION: GETTING TO YES

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THE PROBLEM

If we are going to do something well, it helps to know what it is we're trying to do. We negotiate all the time; we negotiate so often that we sometimes forget what the problem is. We negotiate with our families, with our friends and with our colleagues. We neogtiate on every conceivable level. Basically the problem is the situation where there are differences of interest leading to conflict and yet there are shared interests in doing something together so you don't just walk away in opposite directions never to see each other again. Conflict, fortunately for those of us in the conflict business, is a growth industry. Business is booming at every level.

When I was in law school, we had the theory that there were three branches of government that would decide things by legislative, judicial or executive action. We all known that legislation is one long negotiation from beginning to end and when you pass the law you start to negotiate its implementation whether it is law or regulation. We know that 95 percent of all law suits are settled through negotiation. The days of deciding things by executive actions are over, not only in government, but in universities and businesses as well. In participatory decision-making, more people want to get into the act at every level. Internationally, we used to have 50 countries represented at the United Nations. Now there are 158 members and, in addition, there are all those other actors with the strange initials like PLO, ITT, IBM who are also playing games on the international scene.

In universities, there are many more people making decisions. When Dean Pound was Dean of the Law School, he decided everything by himself. He just announced what the decisions were, where the classes were being held and what the salaries were. Now we are using participatory decision-making about hours of teaching, about what we do, where we do it and when.

The standard approach to negotiation is well reflected by the haggling at a bazaar. One of my students says he knows how to negotiate. "You go into the oriental carpet shop, and you look around. You indicate a great deal of interest in something you don't want and casually look at something you do and then you say to the dealer 'that filthy carpet in the corner over there, my dog might like to sleep on it in the winter in the garage. I'll offer you $10 for it.' The dealer says that is his best Persian oriental carpet worth $3000 but because you are an American, he will sell it to you for $299." Then negotiations start. Each one argues. He takes an extreme position; you argue and slowly make concessions. The more slowly you make the concessions, the more extreme your position, the better you will come out in the end. You may not reach agreement but that's the standard way you make concessions; you haggle.

There are two ways to play that game. Basically, there's the nice guy soft way to play. You come in and say, "Look, I'm very reasonable. I know the value of carpets. I'm very reasonable and I will make concessions quickly in order to make an efficient result." The danger of being a soft guy is that you can get taken by the hard guy. But even if two people play soft, for example, in families, both husband and wife frequently play the soft guy. "I can be more generous than you can be on this. I know you want to go out to dinner at that Chinese Restaurant, so we'll go there;" and "Jesus, I know you want to go to the steak house so we'll go there." Each one is trying to satisfy the other, when probably both want to stay home the whole time. You know the O'Henry story of the man who sold his watch in order to buy combs for his wife's hair while she sold her hair in order to get a chain for his watch. They celebrated Christmas with a chain and combs. Being soft does not necessarily produce wise agreements. It produces them quickly and fairly amicably except each person thinks they've been more generous than the other. They think, "I was more generous than you." It may damage the relationship in the long run. The main problem with being a soft bargainer is that the soft guy gets taken by bargainers. If I am prepared to make concessions as necessary, in order to reach an agreement, you will demand concessions in order to reach agreement. If I insist we reach agreement, you will insist it be on your terms. Being soft is no answer.

On the other hand, if you play tough in that game, it can be contagious. Tough statements lead to tough reactions. The more extreme your opening proposal, the more extreme the other side's will be. The more slowly you make concessions, the more painfully and slowly they will make concessions.

Internationally, Prime Minister of Israel, Golda Meir, was a master of this art. When Henry Kissinger was negotiating disengagement on the Golan Heights, Mrs. Meir had decided that she would give up the city of El Kantara completely. She divided El Kantara into 14 packages of individual streets. Each time she would resist until Kissinger was about to leave town and then, with great reluctance, she would make one of these prefabricated concessions and refuse to do anymore until he went to Damascus and got something for it. A great deal of

time can be spent on this process and yet you don't always reach agreement. It produces confrontation if it becomes a contest of will. It rewards stubbornness and the most recalcitrant and difficult person. The result tends to be that you reach this state because there is an incentive for confrontational behavior, stubbornness, inefficiency and consumption of time and resources. It tends to be damaging to the relationship where each side will not back down until the other concedes. A contest of will is not a very pleasant occasion. "It's your fault; you are the problem. You better back down because we can be tougher than you can be, and we can escalate." If you do reach agreement, the relationship tends to be damaged, and the problems you had are exacerbated. This tough stance does not necessarily produce very wise results. If there is no standard of wisdom taken into account in the process, it is hard to see how the result will be wise by any standard of wisdom.

Joint problem solving is what the real problem is. There are three standards we want: efficiency of method, wise results, and the ability to produce it amicably. Basically what we have been doing at Harvard is trying to figure out how to achieve these three standards. If two people came to me and said "Hey, we want to settle our differences wisely, efficiently, and amicably; how do we do it?" What is the best advice we can give? If a husband and wife want to say "Look, we want to negotiate our divorce wisely, amicably, and efficiently; how do we go about doing it?" Would I say "take the most extreme positions you can. Be stubborn, draw everything out of the joint checking account; it will give you a negotiating advantage." I can turn any difference into a full scale conflict in no time at all. Lawyers frequently do. We frequently are litigious, adversarial, confrontational and very expensive.

This fall two acquaintances of mine were involved in a divorce proceeding. They had spent half a million dollars in legal fees in nine months suing each other over rapidly dwindling assets, which at that rate were going to be completely gone before the divorce was final. I didn't want to get in the middle. I said "You won't like me if I mediate this because you'll both think I should be on your side. You think that fair is the way you want it. I don't want to get involved. You've got plenty of lawyers already." But they begged me, as a friend to do it, and four days later the case was settled. Now they both hate me for it. Blessed is the peacemaker because no one else will thank him except God.

The critical variables of negotiation are many. I can tell you anecdotes on what to wear and to have a firm handshake. I can pontificate that wise negotiation depends on three things; timing, experience and judgment. Now go forth and negotiate wisely. What timing, what experience, and what judgment is your problem. I told you what it depends upon; now go do it. We must try to look for a framework for thinking about negotiations and what things can be most useful to you.

I. SEPARATE THE PEOPLE FROM THE PROBLEM

First, to maintain a relationship as a working

relationship in order to produce wise results, it is important to separate the relationship from the merits. We sometimes call this separation of the people from the problem. Deal with both the people, problem and with the merit problem. When two people, or two sides are facing each other, each is likely to think that the other is the problem.

The woman who says, "Our relationship is in trouble unless I get a fur coat for Christmas," has just pointed out that the relationship is in trouble. If you are bargaining the relationship against the merits, the relationship is damaged already. That is what appeasement is all about.

You don't need B. F. Skinner to know that if you reward outrageous behavior, what you get is outrageous behavior. If someone negotiates with a woman saying, "All right, here's your fur coat, that will solve our problem", you can expect her to say, "Now. our relationship is in trouble unless I get a washing machine, an automobile," whatever it may be. When Mr. Haig says our relationship with the Soviet Union is in trouble unless they get out of Afghanistan, they know that if they get out Afghanistan in response to that threat, he will then say, now our relationship is in trouble unless you get out of Ethiopia, Poland, Angola or El Salvador. A union or a university president who says, "Our relationship may be in serious trouble unless you give into me on this," is walking into a mess. Breaking diplomatic relations, whether done internationally or privately by cutting off communications, is a poor way to negotiate. You want to turn it into side-by-side problem solving. You want to say, "O.K. we have a relationship question between us, and there is a problem. Let's face that problem side-by-side . I may not like you; I may not trust you. But, there is a problem." Disentangle relationship problems from the merits and deal with each separately. You can't sell a relationship, nor can you buy one. Every time we terminate a relationship as an effort to improve our bargaining position, we have to negotiate the relationship back in order to get what we want.

Negotiation means changing somebody else's mind. To change their mind, we must know where their mind is. This is achieved not only through talking, but also listening. We want to know as much as we can. Terminating a negotiations position is about as destructive as hiring a lawyer, putting cotton in his ears, a handkerchief in his mouth, and saying "Go off and represent me because we're getting along poorly." The more poorly you're getting along, the better you need to communicate, and the better you need to listen. Talking to someone doesn't mean you approve of him or his position, nor does it mean you like him. Lawyers talk to each other without approving of the behavior of the other's client. In order to resolve differences, it is extremely important to engage in effective two-way communication and not limit that communication as a bargaining device. To reiterate the first point, it is to separate the relationship from the merits and deal with both, but disentangle them and do not bargain one against the other. The more difficult the problem, the more important it is to maintain a working relationship.

II. FOCUS ON INTERESTS, NOT POSITIONS

The second point is separation of positions from interests - talk about the interests. Most negotiations start off with arguments over declared positions. The more people argue about positions, the more they lock themselves into those positions. For example, the more I challenge your position, the more likely you are to insist upon it. The more attention I pay to your position, the more extreme a position you're likely to take. Positions are simply unilateral decisions as to what you think might be a satisfactory answer, but your interests are what you're trying to serve.

Interests are different. Interests are the needs, the hopes, the fears and the reasons. Interests tend to be much more compatible than positions. Interests can get complicated, because taking positions develops an interest in saving face. Somehow it's always the other fellow who wants to save face. We want to adhere to principle but it comes out the same way. If you try to find a way to make it look successful for both parties in the interim and in the long term you begin to get into the problem of looking at interests. So, the second major point is talk about interests, not positions.

III. IDEAS FIRST - DECISIONS LATER

Point number three is to separate the inventing from the deciding. Instead of deciding first and generating ideas later, generate ideas first and decide later. This classic principle of wise unilateral decision-making is also true for joint decision-making. It's best to nominate many ideas before you decide among them. What if you were asked, for instance, who should get the Nobel Peace Prize or who is the one person in the world most deserving of it? Everytime you come up with an idea you would think, "Why do I know that's the best person?" Judgment inhibits creativity. Having to decide to support a person makes you reluctant to come up with a name. On the other hand, trying to come up with one hundred names of people that someone might think could be considered for the Nobel Peace Prize generates ideas quickly. Then the decision is made. The same is true of negotiations.

IV. THE INSISTENCE ON OBJECTIVE CRITERIA

The fourth proposition is not to base your decision on a contest of will but on objective standards. Don't argue about what people will or will not do. Argue about what's fair, by some objective criteria. For example, precedent, principle, law, equality, what others have done and productivity are some standards. Convert the negotiations into an argument about what will be a fair result rather than a contest of who will give in to whom. You will not immediately agree on one standard. There are many standards, but what I'm suggesting is that it is better to argue about standards than to argue about what you're willing or unwilling to do. The virtues of standards are multiple, not the least of which is that you will have some sort of fair result.

Where there is a reward for stubbornness, the standard is that we will quarrel about the standards and the implementation. That really is essential to wise negotiations. It's fairly subtle because many people use principles as arguments. We insist on cost-of-living when what we are really saying is that we want a fair result. If we think these figures are fair, you come up with a fairer result. We will always be willing to listen and we will decide which is the fairer result. When you are selling your house it's easier to say I'll sell it for market value (let's argue about market value, recent sales in the neighborhood, inflation, changing interest rates, whatever it is) than to say I demand $100,000, you offer $50,000 and let's quarrel. It shifts it over to the problem solving technique. This lets you engage in what is called problem sharing. People tend to think that they have their problems and you have yours. Essentially what you want to know in negotiations is the other side's problem, because that problem is also your problem. Not exclusively your problem, but my problem and your problems are our problems and we have to deal with them together. We have to find a fair basis that each of us can accept. That fair basis will make it easier to accept, easier to sell to our constituents and will protect us from blackmail, extortion and arbitrary demands or unreasonable positions.

V. BATNA - BEST ALTERNATIVE TO A NEGOTIATED AGREEMENT

There is a fifth and final point. It is, to use the jargon found in the book, Getting to Yes, develop your BATNA or your Best Alternative to a Negotiated Agreement. My power in negotiations depends upon my best alterative. Arbitration of bottom lines is not very helpful. You don't know whether they are or are not better than you in making an agreement. If I say, "I'm asking $100,000 for the house and my bottom line is $75,000," I have no way of knowing if I haven't sold the house for $75,000 by Christmas, what I'm supposed to do. Should I have taken it all for $60,000 or should I tear the house down and make a parking lot of it? The only way to protect yourself is to decide contingently what your best alternative will be and at what point you will walk away to improve it. If the best walkaway position for a union is "working to rule," look at that option carefully. If it's a strike, look at that carefully. If that option is not good enough, make it better. My power depends on my best alternative, not your worst.

I tell students if you want a job as a young lawyer with Kodak, the best thing is to have a job offer from Polaroid. If they don't hire you, you have a place to go. This best alternative is more valuable than having a gun in your pocket saying, "Give me a job or I'll shoot you dead." Here, the employer's alternative has suddenly gotten worse. He might lose a potentially promising employee or he might be shot. But this certainly doesn't enhance the negotiating position. It is subject to all kinds of counter-threats.

Effective power depends upon knowing where you can go and improving it. Mr. Haig, in mediating the Argentinian/British dispute over the Falklands has demonstrated no effective negotiating power. He was saying, please reach agreement and if you don't, I'll come back tomorrow and offer you something better. There was absolutely no reason, until the first shots

were fired, for either side to accept any proposal he had for them. For each side, the choice was simple. "If we say yes, we divide public opinion at home. We accept a compromise and we give up the option for something better. If we say no, we look strong. We get popular support. We may get something better and we can always take these terms later...at no cost." This is a very persuasive case for saying no. It seems to me that the Secretary should have had in his pocket what he would do if the parties did not agree. He should have said "Here are the terms I'm recommending to you to agree upon and if you don't, this is the resolution I'm going to recommend to the Security Council to adopt. I would be happy to have your comments on them and your suggestions, but if we haven't reached agreement before further shots are fired, I'm going with the cease fire resolution on these terms. That's the best thing I'm going to do if you go to war. It's your fault, not mine. It's your problem, not mine and this is the best I can do." Improving and having your own walkaway position enhances your negotiating power completely.

In conclusion, you got the full course. In selecting the title for the book, the writer came up with Getting to Yes as the ideal title. It's a book that makes you think you have accomplished something just by buying it. The model title was The Sensuous Woman. People buy that book thinking they've already become a sensuous woman just by buying it. The Royal Canadian Air Force Exercise Book has the same effect. People buy the book and they feel a little more fit. They have another drink, relax and say they got it.

What I have to tell you is that Getting to Yes will help organize some ideas, but it's up to you. It's a framework for thinking. It provides a way of learning from your experience and a way of organizing concepts, but as I tell the students, you can't just read the book. It's a question of learning from doing, of being able to have a framework of ideas that help you determine what this is all about. Is my relationship in trouble, was I not listening enough, was I not being creative enough? The framework of the four or five points outlined here can give you a way of going forward in your own negotiations. They may fail, but don't think you win at negotiations. It's like who is winning a marriage. I was struck at how controlling the perception is of who is winning in negotiations. My son and I were playing frisbee in England some years back before they had even seen a frisbee. We were playing catch in Hyde Park on a beautiful fall day about 15 to 18 years ago when a group of Englishmen gathered to watch this strange sport. Finally, one Britisher came over and said, "Sorry to bother you. We've been watching you for about an hour. Who is winning?" Well, we were both winning and I think that with this approach to negotiations, we all can win.

4. DISSECTING THE NEW RIGHT AND ITS THREAT TO COLLECTIVE BARGAINING

Roxanne Bradshaw
Chairperson
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A year and a half ago I watched an interview with Paul Weyrich, Executive Director of a Committee For Survival Of A Free Congress. I became incensed with the arrogance with which he took credit for the gaining of power by the political new right. I knew little more than what I had read in the local newspaper about the leaders and activities of this group calling themselves the New Right, even though they had been gaining visible power since the mid-1970's. All of this was occurring as I was giving serious consideration to applying for a sabbatical leave.

The end result was a decision to take a sabbatical leave to work with a Washington, D.C., based research and information center called the Interchange Resource Center. Interchange is made up of 120 participating organizations representing education, labor, church, feminist, consumer, and civil liberties. At the time I first made contact with Interchange, the organization had started a project of developing state networks to support the efforts of the national network to monitor and inform people about the activities of the new right. I felt the logical selection for a sabbatical project was to organize networks in five western states. I was involved in that unbelievable task from June until December of this last year. All that was changed is that I am now back at work full time in addition to the Interchange project, the NEA Board of Directors, the CEA Board of Directors, and the NEA Higher Education Committee. It is not commitment--it is insanity.

The Octagon Model

I had the good fortune of encountering Dr. Betty Chmja of the State University of Northern California while organizing for Interchange in Sacramento, California. She has spent the last few decades studying the various resurgences of the ultra-conservatives in the United States. It is from her basic model that I have expanded what you will now hear as the octagon of the new right.

The major target of this information sharing is the threat that the new right poses for the future of collective bargaining. It is impossible to understand that threat without building an awareness of the size, monetary strength, and organizational leadership of this massive movement. Since this discussion centers around the extreme end of the political continuum, it is important that you understand that I am not talking about traditional conservatism. The new right does not include the traditional conservative Republicans such as Willaim F. Buckley, Barry Goldwater, and George Will. In fact, these particular persons are under harsh attack from the new right. The new right has managed to gain a controlling power base in such influential pockets of the Republican party as the

platform committee and the budget and finance committee. The old conservatives and the moderates with the Republican Party are probably under greater duress from this movement than any of the Democrats.

The eight sides of the octagon of the new right are as follows:

1) the economic side
2) the political side
3) the religious side
4) the pro-family side
5) the educational side
6) the rural side
7) the radical side (which is note new)
8) the anti-union side

The new right financiers who control the economic side are white, Anglo-Saxon, and rich. They are led by Richard Mellon Scaife, great-grandson of the founder of the Mellon empire. Donations to ultra-conservative causes from Scaife are estimated to be at ten million dollars per year. Joseph Coors, owner of Coors Brewing Company, is the second largest single contributor. He contributes approximately one-third of the total amount of Scaife's donations. He is a member of the National Association of Manufacturers. He was a contributor and founder of the Heritage Foundation. He has also served as chairman of the Foundation.

Jay Van Andel and Richard De Vos, founding partners of Amway Corporation, are both active in a variety of far right causes, including the Business and Industry Political Action Committee, the National Association of Manufacturers, and several fundamental religious right groups. Recently the Amway Corporation purchased the 950 member Mutual Broadcasting System. The major direction for this system will be to broadcast Christian-political programming.

J. Robert Fluor of Fluor Chemical Corporation is on the Board of Directors of the Foundation of American Communications. This foundation was founded by Richard Mellon Scaife for the purpose of giving the members of the media a more conservative viewpoint. Fluor was also a former chairman of the Heritage Foundation as well as chairman of the National Legal Center for the Public Interest. James Watt was a law partner in the Mountain States Regional Office of the National Legal Center for the Public Interest. This enterprise has eight (8) regional offices across the country.

Some organizations which further the corporate concerns of the new right, in addition to those which I have already mentioned, are as follows: the American Council of Science and Health, which was developed to give a new view to the consumer; Citizens Choice, which is supposed to give the people a different consumer advocate; the Consumer Alert Council, which was orginally developed as a counter to the efforts of Ralph Nader. These organizations oppose government regulations because they believe that the public can find out about the dangers related to certain products on their own, and then make

their own decisions.

The issues of the economic right are: elimination of restrictive taxation for corporations; elimination of health and safety regulations placed on corporations; elimination of equal employment regulations; passage of legislation that would give corporations greater protection for consumer concerns which result in loss of profits.

On the political side of the pentagon, I have placed the brain trust of the new right movement, Paul Weyrich. Paul Weyrich is originally from Colorado. He entered Washington politics as an aide to Colorado's Senator Gordon Allott. From there he established his own based of political power. Richard Viguerie and Howard Phillips have both been Weyrich's closest allies in building the new right into a credible political machine. Richard Viguerie has been responsible for developing a very lucrative system of fund raising through the single issue, computerized mailing. Howard Phillips, a creative political organizer, is among the persons who call themselves "Jews for Jesus" (an abomination from any point of view). He is currently the director of the Conservative Caucus. He was orginally hired by Richard Nixon to dismantle the Office of Economic Opportunity. He was a former head of both the Young Americans for Freedom and the American Conservative Union. In 1978, he switched parties to run as a Democrat for the U.S. Senate from Massachusetts. A man by the name of Morton Blackwell can be relied on by Weyrich for direct input to the President. Morton Blackwell has been a friend of Weyrich and Viguerie since the inception of the current new right movement. Following Reagan's election, he was hired as the White House aide in charge of new right concerns.

George Gilder is seen as the political philosopher of the new right. President Reagan even recommended that his Cabinet read Gilder's most recent publication, Wealth and Poverty.

Terry Dolan is another powerful force in the political activities of the right. He, along with Jesse Helms, founded the National Conservative Political Action Committee. Unfortunately, this group may be able to take credit for the manner in which political campaigns are run in the future. The negativism and partial truths and distortions of fact that NCPAC has put forth have created a temptation to use an equally negative approach from the opposing side.

A major part of the political agenda is to increase spending in the areas of militatary might and foreign policy. The tragedy of this is the mentality of persons who say that military might is our foreign policy. The goals in the area of increased military strength are: to reinstate the arms race, to establish a nuclear theatre in Western Europe, to fund the MX missile project, to fund the B-1 bomber project, to develop increased sophistication in the area of chemical warfare, and to develop a strong anti-communist policy.

There was a time when national defense was seen as a program of improved education, initiation of a school lunch program, and development of scholarships for pursuit of degrees

in mathematics and science, as well as traditional military strength. This is no longer the attitude toward national defense because of the successful efforts of the new right. Instead, we are entering the era of "goldplated" weaponry, as recently stated by Senator Kennedy.

There is another effort of the new right which is taking place at the state level. The American Legislative Exchange Council writes blue print legislation for new right issues to be introduced at the state level. You can write for a copy of the legislative packet at the following address: ALEC, 418 C St. N.E., Suite 200, Washington, D.C., 20002.

The key members of Congress who are the leaders in support of the issues of the political right are Hatch of Utah, Helms of North Carolina, Laxalt of Nevada, Tower of Texas, Dornan of California, Crane of Illinois, and Kemp of New York. A summation of the issues of the political right are listed as follows:

1) Eliminate government spending for education and human needs programs;
2) increase military spending to rebuild American military strength;
3) support and enact the New Federalism;
4) support and enact family protection legislation.

The religious right is certainly the most visible of all sides of the octagon. It loses its influence within the octagon only on certain issues when religious and pro-family issues are pitted against economic and corporate needs. The Moral Majority is only one of several fundamental religious groups in the far right. A few of the others are the Christian Voice, the Religious Round Table, and the 700 Club.

The Moral Majority

The Moral Majority came about in 1979, through the joint efforts of Paul Weyrich and Howard Phillips. It was they who selected not only Jerry Falwell to be the charismatic leader of this religious political action committee, but it was also they who developed the name for this group. The Moral Majority now receives over 74 million dollars a year in contributions, primarily from the evangelist "Old Time Gospel Hour," which has been led by Jerry Falwell for over 25 years. The former executive director of the Moral Majority was Robert Billings, who left to become Ronald Reagan's campaign religious coordinator. He has since been named the consultant for the reorganization of the Department of Education.

Other personalities involved in the evangelical movement are Pat Robertson, who hosts the 700 Club, and Tim and Beverly LaHaye, who lead Californians for Biblical Morality. The LaHayes offer and jointly teach "The Hope of Our Heritage Conferences." One of the topics of the conference is "Humanism, the Most Dangerous Religion in America." They have also offered such not so well known books as, The Unhappy Gay and How to be Happy Though Married. Mr. LaHaye is also one of

the directors for the Moral Majority.

James Robison, the evangelical preacher from Texas, is probably the most fiery of all. He believes that all our complex problems can be solved by the Bible and a return to a strong patriarchy.

There are many additional persons and organizations involved in the movement, but due to limitations on time, I will move directly to the issues of this group. They are pro-life even though they are also, pro-gun, pro-capital punishment, and pro-war. They are pro-family even though they are opposed to day care for children, family planning clinics and food stamps for hungry children. They oppose big government but support the massive amount of dollars being put forth for the military program.

The educational right has made the public education institutions the target of their attacks. The right-wing critics of education claim that they have accumulated extensive evidence that school teachers, as well as textbooks, library books, films, supplemental series, and other educational materials are tools in the schools' conspiracy to foist secular humanism on unsuspecting children, making them vulnerable to socialist and communist philosophies.

Norma and Mel Gabler of Longview, Texas, have been reviewing textbooks for the past 25 years. Only recently have they had the immense support from the grassroots movement to eliminate from the schools godless, humanistic and secularistic teachers. Mel and Norma's group, the Educational Research Analysts, are now functioning as the education consultants for the Moral Majority. Some of the key words and issues that are looked for in textbooks are: coping, self-esteem, world cultures, ecology, inter-racial attitudes, sex education, drug education, and best of all, anti-automobile attitudes. These are only a few of a list of several hundred terms.

Another group actively involved at the local level is that of Concerned Parents. This group originated with the formation of a group by Janice Egan, called Parents of Minnesota. They have since expanded to several states. Their efforts are concentrated on curriculum content and they use the research of the Gablers to support their attacks.

The Heritage Foundation, through the work of Onalee McGraw, provides the research support for all the issues being raised in regards to education, from the Department of Education to secular humanism. This foundation is even supplying the White House with the basis for decisions in the form of a document called A Mandate for Leadership.

The attacks against education are not limited to elementary and secondary institutions. The institutions of higher education are experiencing many of the 1950 type of anti-intellectual attacks. LeBoutillier of New York is on a campaign to remove federal funding from any university or college which may be employing Socialists or Marxists as instructors.

The issues of this side of the octagon are: textbook censorship, prayer in the schools, Christian teachers in the classroom, concept of traditional family being taught, anti-busing for desegregation, and anti-coeducation for classroom instruction. And last, but most important, is the issue of tuition tax credits and voucher systems. Once the attacks have created enough hostility in the public toward public education, the use of public monies to support private education will be easily achieved.

The latest group to emerge from the new right is a group which Dorothy Massie of the NEA calls, the "barefoot-and-pregnant" coalition. All of the issues of this group are embodied in the Family Protection Act. This legislation was first introduced by Senator Laxalt of Nevada and was more recently re-introduced by Senator Jepsen of Iowa. Nearly all of the persons we have talked about previously are in some way connected to this movement. One person who has not been mentioned is Phyllis Schlafly. Phyllis Schlafly has secured a place in the pro-family movement through her past efforts with the group she founded, the Eagle Forum. As a researcher for Joseph McCarthy, we have some idea as to her political ideologies earlier in her career. Phyllis' most visible efforts have been in the STOP-ERA campaign for which she is also president.

The Mormon Church is supportive of the Family-Protection legislation and has made its impact most recently in the Western States in an all out war against the ERA.

The issues within the pro-family movement are: anti-ERA, anti-abortion, anti-homosexual, anti-union, pro-censorship, pro-traditional role of women, pro-tuition tax credits.

The rural right is alive and well in the Western United States. The groups which are idenified on this side of the octagon are; the Freeman's Institute, the Posse Comitatus, and depending on the state and the leadership of the particular affiliate, the Farm Bureau and the Cattleman's Association. Freeman's Institute is developing into the John Birch Society of the Mormon Church. It is run by a person named Kleon Skousen from Salt Lake City, Utah. Mr. Skousen holds conferences on "The 100 Things Wrong with America", which reads like any other new right agenda. At one time, this group was denounced by the Mormon Church. Recently, the Church has been more accepting of Skousen and the Institute. President Kimball received Skousen in the Temple and thanked him for the contribution he is making. And last year Senator Hatch made the address at one of the conferences. Eldridge Cleaver recently joined the Institute to help Skousen in his efforts.

The Posse Comitatus it truly out of the Old West. This is a group of vigilantes who claim that they are extensions of the law. The group is super-patriotic, ultra-conservative, and opposed to gun control legislation. They also claim to be a group who have joined the tax revolt. According to the Posse, the only law enforcement agency which has any legitimate power

is the County Sheriff.

In the mid-West the Farm Bureau offices have been known to pass out John Birch Society materials. The Cattleman's Association is most directly involved in rural areas where workers have encountered opposition from them in collective bargaining efforts. Some of them have been known to resort to vigilante tactics to curtail workers' efforts.

The Radical Right

Usually, the radical right is the group I leave until last because this group is not part of the new right, but it does seem to experience alarming rates of resurgence during times of economic distress. The two traditional groups which exist on the radical right are the Ku Klux Klan and the Neo-Nazi movement. The KKK has registered moderate gains in membership of 20% to 25%. David Duke, the three piece suited Klan leader who manipulated the mass media through his "Martex sheet" dialogues, was chiefly responsible for the gain in public attention. There are now five (5) major invisible orders which include 10 thousand to 11 thousand members. The membership is not as alarming as the increases in levels of activity. Also alarming is the degree of credibility many of the leaders have gained. Tom Metzger of California, a well known Dragon of Southern California, ran in the Democratic primary last year and collected 30 thousand votes.

The Neo-Nazi Party in America today is seen as the emblem of hate flaunted by a troublesome but very small few. The major points I would make is that the economic times in which we now find ourselves make a healthy breeding ground for such groups as the KKK and the Nazis who are racist and anti-semitic in their foundations. It is during depressed times that the beleaguered populace look for scapegoats.

The Anti-Union Right

I have chosen to deal with the anti-union right as the last side of the octagon so that you may understand that the anti-union effort is not an isolated event. Rather it is a well orchestrated effort of several sides of the octagon to bring labor to submission.

The anti-union campaign is being led by the Public Service Research Council, the National Right to Work Committee, the U.S. Chamber of Commerce, and the Committee to Defeat Union Bosses Candidates. The anti-union supporters within the Congress include Senator Strom Thurmond of S. Carolina, Jesse Helms of N. Carolina, John Tower of Texas and Larry McDonald of Georgia. The anti-union far right claims that unions are uncontrollable and violent. They also support legislation that would give the federal government the rights and responsibilities currently held by states and localities, to prosecute any violence that occurs during the course of a strike. Americans Against Union Control of Government, which is a division of Public Service Research Council, has published a 147 page book of news clippings called Public Sector Union

Violence. The 1980 section of the book lists news clippings from a total of 23 separate incidents from January 1 to October 15. Some are stories of harassment on the picket line and shunning of strike breakers. Fourteen of the clippings reported action by local law enforcement authorities--police investigations, arrests, indictments. On the basis of these occurrences, anti-union forces want federal intervention. The Public Service Research Council, headed by David Denholm, is telling the public that federal action is needed because, "some unions and union members, it seems, will stoop to anything to get their way, even murder." An ad put forth by Americans Against Union Control of Government warns that, "The plain truth is that public sector union violence is at an all-time high and getting worse."

The platform for this activity is Senate Bill 613 introduced by Strom Thurmond. Thurmond's bill, and its House counterpart, House Bill 3047, would amend the Hobbs Act, that deals with extortion, to make incidents occurring in a labor/management dispute a federal crime. Ironically, this piece of legislation is attracting supporting from those who normally oppose intervention in cases of rape or domestic violence--crimes which far outnumber violence during strikes.

The attacks against educators are being led by the National Right-to-Work Committee which conducts slick, professionally designed, and hard-hitting ad campaigns against unions. One ad run in numerous respected magazines last year was headlined "The Ulimate Threat to Academic Freedom." It featured a bearded, scholarly college teacher described as "an officer of the Minnesota Democratic Party and an unabashed liberal" who had rebelled against the concept of mandatory payment of union fees by public employees.

These ads are carefully designed to appeal to individuals who consider themselves liberal, was well as conservatives who already have their minds made up on the union question.

Right now the anti-union campaign is being waged most heavily in the public sector, because it is among public employees that the union movement continues to grow rapidly. The campaign is being directed with savage intensity against educators in the public schools, but as you can see from the example of the ad I described above, the attacks are spilling over into attacks on faculties within state funded institutions. The real goal of the right-to-work movement is the revival in this country of a union-free environment.

We have a massive challenge before us to keep collective bargaining alive. We must begin by educating our own colleagues and by dissecting and understanding the new right octagon. We cannot hope to combat an enemy that is not readily recognized or understood.

5. THE IMPACT OF UNIONS ON ACADEMIC STANDARDS AND ACCREDITATION IN HIGHER EDUCATION

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Introduction

I would be remiss if I did not extend my gratitude at the outset to Dr. Douglas, Director of the National Center, for bestowing upon me a simple topic which lends itself to brief, precise, and objective analysis.

In discussing the topic it is necessary to raise questions such as these:

What is the impact of college teachers' unions on the quality of education?

In what ways do unions advance the cause of education?

In what specific ways do unions serve to establish and maintain sound educational practices?

In what ways are unions adverse to sound educational practices or to upgrading the quality of education?

Having invoked the vague and mystifying phrase, the quality of education, let us recognize as we begin that there are honest differences over what this means both conceptually and practically. At the risk of being accused of arbitrariness, let me suggest that one secures greater or lesser quality in the measure to which one succeeds or fails in helping students to learn, and in assuring that teachers are competent, industrious, and effective.

My focus is on public higher education, partly because of the greater extent of unionization there, partly because I am more familiar with it, and partly because I believe that unions contribute significantly to the quality of education in the nation by promoting adequate funding of our public schools and colleges. Further, although I have occasion to refer to my own campus, I do so only to highlight examples which could be matched typically in other unionized institutions. I aim to speak about common features and trends, not an isolated situation. Also, I shall try to paint a picture of what is, and only incidentally of what ought to be. I wish to illuminate the real, not an ideal world.

I recall a comment by Adolph Eichmann to the effect that he had throughout his years as a Nazi never once violated Kant's categorical imperative. This principle of morality

holds in one formulation that one should always act so that the maxim - the practical rule or rule of thumb - implied in one's action may become a universal law, and in another, that one should always treat a human being as an end and never as a means only. I cite this because on the topic of unions and quality a healthy skepticism is warranted. All unions and union leaders claim to support high quality education in principle. The question, though, is whether practice is faithful to principle. What do we actually find when we look to the means which unions employ to effectuate their alleged commitment to upgrading the quality of education? What are the actual consequences of unions on the learning of students and the teaching of teachers? By their fruits ye shall know them. Is it perhaps the case that unions are soft on quality when it comes into conflict with the economic interests and the job security of their members? Can we liken the unionist's proclamations about the importance of quality to Augustine's pre-conversion prayer, "Lord, make me pure, but not quite yet."?

Adequate Funding

There are points at which the interests of unions and union members, whether drawn broadly or narrowly, coincide with the quest for quality. An obvious but important one is in insuring adequate funding. The day is long since gone when a superintendent or a president can handle this task single-handedly. Experience demonstrates that it is foolhardy to assume that legislators will fund public education adequately, or that the public will demand that they do so. Since funding is a function of political decisions and public attitudes, and since the degree of quality is directly related to the adequacy of funding, unions advance the cause of education by engaging in political action - campaigning and lobbying - and public relations. This is why the "professional" associations of the '50's have become the teacher unions of the '80's. This explains political action funds, endorsements, and Ed Asner's public service spots on TV and radio.

I am not suggesting that money alone insures high quality. Money is a necessary but not sufficient condition of high quality. Money can be wasted; it can be spent in ways which have little if any bearing on learning or teaching; and money is only one ingredient, albeit an essential one, in education. Nevertheless, in guaranteeing access to both basic and higher education, and in providing the varied mix of programs and courses to match the needs and abilities of students, there are minimal, definable levels of funding which simply must be achieved. Here, at least in the present circumstances, unions are indispensable. It is no secret that unions fail quite regularly in their efforts in the political arena and in the public relatons arena. Yet, had the efforts never been undertaken, the overall situation in the nation would be much worse. Who can reasonably deny this when he measures the impact of the Professional Staff Congress in the City University of New York, or APSCUF in Pennsylvania, or the United Faculty of Florida in that state?

Teachers themselves are also responsible for setbacks in cultivating a strong public commitment to education. Paradoxically, the very idea of teachers organizing, bargaining

collectively, and pressing demands alienates some people. Even if justifiable morally, strikes sour people on teachers, especially when a strike is a violation of law, and when a teacher pledged to forego a strike when he accepted employment, in circumstances parallel to those of air controllers. Who can assess the harm to the cause of education and the interests of teachers when a teacher is charged with trafficking in drugs, or with sexual relations with children, as happened recently in my own community?

Teachers themselves are also responsible for setbacks in the political arena. Many are apolitical. Far too few become actively involved in campaigns, either as workers or contributors. Politics is beneath their dignity. A poll commissioned by one of the national unions after the last presidential election revealed that, though it spent much money and spilled much ink in behalf of Mr. Carter, as many of its members cast ballots for his opponent as for him. Further, I have seen estimates which cite fully one-third of the teaching community as non-voters.

The reference to political action is timely, to say the least. The prospects for quality in education grow dimmer each day in the midst of the general economic malaise. Few public colleges and universities can afford the luxury of worrying about improving; they are worrying about surviving. One cannot reasonably speculate about whether a house needs a new roof or a fresh coat of paint in the kitchen while flood waters are rising inexorably around it.

In most states, projected tax revenues far exceed actual receipts. In Ohio, for instance, the state budget director's forecast of the shortfall in revenues over the biennium has risen from $1 billion a few months ago to $1.5 billion in his most recent estimate a few weeks ago. Appropriations to schools and colleges have been cut twice already, and further cuts are planned. Tuitions are spiraling upward. Elementary and secondary teachers are being laid off by the thousands. Vacancies are going unfilled at all levels. Plans to develop new programs or to buy new equipment have been shelved across the state. The present economic climate is such that individuals and businesses are simply not generating the tax revenues necessary to provide a minimally satisfactory education to Ohioans, let alone the "thorough and efficient" education required by the state constitution. A new round of tax increases will bring short term relief, but a genuine solution hinges on rejuvenating the nation's economy. The front page of our newspapers has become a business obituary. The number of Americans out of work is mind-boggling. The ghost of Herbert Hoover occupies the White House, practicing a politics of asceticism. In Ohio, as elsewhere, therefore, it is axiomatic that pressing for a political team and a political program to rejuvenate the economy is the major challenge to unionized teachers in America today, and if met successfully, represents the most important contribution which they can make to the cause of education. Those teachers who are "professional," who consider politics beneath their dignity, are ignorant both of their self-interest and their mission as educators.[1]

Faculty unions engage not merely in political action and public relations, but collective bargaining as well. Let us turn our attention now to the campus setting, the labor agreement, and the union's impact on the quality of the faculty and the programs and courses which they offer.

Mandatory Evaluation

In nearly all labor agreements in higher education there are provisions for mandatory evaluation of faculty. In many cases the actual evaluation instruments and procedures are described in detail in the contract. Frequently, the evaluation has administrative, student, and peer components. I am convinced that evaluation is useful not merely in personnel decisions, but in influencing performance. Faculty take their responsibilities more seriously when they are held accountable by others; evaluation is a key ingredient in holding them accountable. Nevertheless, anyone who has experience with evaluation in higher education knows that faculty do not relish evaluation, especially the regular, uniform, and systematic evaluation which labor agreements require. As a rule, faculty support evaluation in principle, but find serious flaws in every proposed evaluation format and instrument. One important contribution of collective bargaining in this area is that it provides the vehicle through which geologic ages of study and experimentation are avoided.

I am not so naive as to claim that mandatory evaluation improves every faculty member's teaching and scholarly production. Some are discouraged and cynical when their ratings remain low over an extended period or suddenly plummet. Now and then an ego is crushed at the discovery that one's overall performance hovers at the mean for one's department, college, or the entire university.

Nevertheless, evaluation induces many faculty to do better. Not all of us can be excellent as teachers or scholars. But, within the limits of our own pedogogical and research skills, we can succeed or fail in doing the best it is possible for us to do. Being held accountable by an evaluator not only incites us to act more responsibly, but, as Sidney Hook has pointed out, it also "enables us to do things which had previously seemed beyond our power."[2] Thus, with the aid of evaluation, we can expand our present limits.[3]

Faculty Development

In my own case, and that of many other negotiators whom I have met over the past decade, when mandatory evaluation was negotiated, steps were also taken to assist individuals with diagnosis and remediation. On my campus this is done primarily through the activities of the Coordinator of Faculty Development. This individual, who must be a member of the bargaining unit, provides consultation to teachers who request it, and organizes a series of very popular workshops for the faculty on subjects as varied as computer-assisted instruction, Socratic teaching techniques, dealing with exceptional students in an open enrollment institution, mid-career burnout, planning and coping with sabbaticals, grantsmanship, and many others, up

to 25 or more in a single year. Surely it is reasonable to believe that many faculty are better teachers and scholars today due to their participation in this sort of faculty development program.

Contracts typically provide other ways to promote faculty development. Many require that there be a budget for professional travel. Many provide that those designated "research professors" receive a reduced teaching load to pursue research for a specified time. Many provide for subsidized leaves for faculty development. At my institution, for instance, our local joined with other faculty groups across the state years ago in promoting the bill which the legislature enacted eventually to create sabbaticals, and then our negotiators secured a comprehensive article on them in our labor agreement. After discovering recently that the requirement of reduced pay for recipients deterred a great many individuals from applying, especially in this economy, our negotiators succeeded in achieving full regular pay for those on sabbatical. This new policy will stir up a healthy competition, encouraging faculty to fashion solid proposals, and it will enable younger and middle-aged faculty to seize on the opportunity since it is now economically feasible for them to take a sabbatical, especially those faculty in disciplines where outside support is scarce, such as the humanities.

Morale

Next, morale has an impact on performance, and there is a definite link between morale on the one hand, and pay, workload, and security on the other. The poorly paid teacher, or the inequitably paid teacher, or the overworked teacher, or the teacher anxious about his job, is unlikely to be as effective as he could be in more favorable circumstances. It is my contention that a unionized faculty feels more secure than a non-unionized one, that a unionized faculty has a higher expectation of fair treatment than a non-unionized one, and that a unionized faculty has greater confidence than a non-unionized one that it will receive its fair share of the institution's financial resources. We can dispute whether these perceptions are accurate; accurate or not, they are real. All of this helps to improve morale, and morale, in turn, affects the enthusiasm, the vigor, which one invests in one's work. Teachers with high morale are likely to be more effective as a group than teachers with low morale. Insofar as unions enhance morale, then, they help to improve the quality of teaching.[4]

Incentives

Generally speaking, labor agreements in higher education do not disturb those traditional practices intended to furnish incentives and to discriminate among the more and less productive faculty. For instance, the system of ranks - Instructor, Assistant Professor, Associate Professor, and Professor - has been preserved, and, typically, promotion in rank comes only through demonstrated merit, and not mere endurance. Further, there is usually an opportunity for rapid promotion for those who are especially productive. Most contracts which I have read also provide for awards for

excellence in teaching or scholarship which carry stipends and prestige. On my campus, as an example, the union took the initiative in securing contract provisions which require the administration to set aside funds in the budget to promote those judged deserving each year, to permit rapid promotion, and to confer up to ten Distinguished Professor awards annually. In addition, many contracts permit the administration to supplement a negotiated raise to award merit. Presuming that such incentives influence the professional behavior of faculty, then, contracts cannot be faulted. Most comply with Aristotle's mandate to treat equals equally and unequals unequally.[5]

Curriculum

Obviously, any discussion of quality must address curriculum. The complicated curricular development and review apparatus that preceded collective bargaining has survived. This includes a myriad of curriculum committees as well as a Senate. Predictions of the demise of the Senate have been unfulfilled. On my campus, as elsewhere, the Senate exists alongside the union and plays an indispensable role in shaping the curriculum and setting academic policies and standards. Indeed, on my campus, the Senate's authority is stipulated in the contract, and therefore reinforced and safeguarded. Never once has there been any significant clash between our Senate and our union. This is not to deny that the scope of the Senate's concerns has been narrowed; typically Senates no longer deal with faculty compensation, workload, grievances, or other aspects of faculty qua employees. This is as it should be. Contrary to the strident anti-union rhetoric of years ago, unions are not negotiating the inventory or content of courses. Programs and courses continue to benefit from the careful professional scrutiny which characterized the pre-union period.

Both by keeping curriculum in the faculty's hands, and by protecting against precipitous and reckless retrenchment, contracts help to assure a diversified curriculum. If each academic department in an institution were entitled to survive based soley on its own student credit hour production, departments such as foreign languages would be in jeapordy. While few administrators are inclined to apply a standard as simplistic and mindless as this, contracts typically pose obstacles to any who would wish to. Faculty will balk at any attempts to delete vital courses from a degree program, and provisions on retrenchment will discourage ill-considered cuts in jobs.

Further, there is a link between job security and the rigor of a course. Where a contract provides job security and thereby diminishes anxiety over jobs, it is less likely that standards will deterioriate in the classroom. This is because in such circumstances faculty feel no pressure to attract "customers" any any cost. On the other hand, the security may deter some faculty from a desirable reassessment of their pedagogical habits. Based exclusively on observing faculty over the years under conditions where jobs are perceived as secure or tenuous, I believe that rigor is better served by security. Nevertheless, this is a matter which deserves a sound empirical study which would be a welcome addition to the

literature both on unions and higher education.

Class Sizes

Like other teacher unions - unions in higher education exert pressures to limit class sizes. Unionists justify this on two grounds--assuring a moderate workload and cultivating an atmosphere conducive to teaching and learning. Now it continues to be a matter of debate in the literature on the subject whether smaller classes necessarily translate into improved learning. Certainly in remedial courses smaller is better than larger. Nevertheless, based on my own experience as a college teacher over fifteen years, in which I have dealt with sections ranging in size from a handful to well over a hundred, I believe that the prospects for succeeding as a teacher are enhanced in smaller sections. These give a greater opportunity for student-teacher interaction which is very important in disciplines such as my own, which is philosophy. Further, for purposes of intellectual development, as well as improving communication skills, it is imperative that students be required to write. The larger the group, the less enthusiastic a teacher is to assign written work. Even the most dedicated teacher shudders at the sight of a stack of sixty or seventy lengthy term papers. The expenditure of time in evaluating essays, term papers, and book reports can become prohibitive. Insofar as unions moderate class sizes, therefore, they make a contribution to the quality of education.

Union Leaders

One way in which a union can be a force for good has nothing to do with articles in a labor agreement. I refer to the example set by union leaders. It is undeniable that a union president is a politician and advocate for his constituency; when he makes public pronouncements, surely he is seen primarily in this light. Yet he is also a much discussed subject as a teacher and scholar among his colleagues, the administration, and the student body. His personnel file receives more than casual attention from his colleagues who evaluate him for promotion. If he is a strong teacher and boasts an impressive publication record, then he not only cultivates respect for himself and the union, but he becomes a model for his colleagues to emulate. Over the years I have found that administrators as a rule confirm that faculty union leaders set a good example as teachers and scholars on their campuses, whatever political differences may separate the two groups. In this quiet but effective way many unions can be said to upgrade the quality of faculty performance.

Tenure-The Need for Change

Will unions acquiesce in all plausible proposals to upgrade the quality of the faculty? No! This is seen most clearly in the case of tenure. Unfortunately, in far too many cases, tenure has been construed in practice as a guarantee of lifetime employment, irrespective of the quality of an individual's work. There is a prevalent attitude among the professoriate that the only circumstances under which a tenured faculty member can lose his position is "financial exigency,"

or "moral turpitude." Charges on the latter grounds are so rare as to be negligible. Thus, the emphasis shifts to the former; this accounts in part for the knee-jerk reaction of faculty to the mere whisper of the phrase, financial exigency. Now I do not quarrel at all with the principle that all employees are entitled to a reasonable amount of job protection. I am mindful that tenure did not appear on the scene accidentally. I agree fully that it is indefensible to dismiss a person with long, faithful, and productive service on the premise that a more qualified replacement is available. I am aware of the need for job security to maintain morale. The link between tenure and academic freedom, though exaggerated at times, is nevertheless real. Further, in the present economic climate, the disappearance of tenure as we know it would not necessarily improve the quality of any faculty; cheap labor practices could operate, the controlling consideration being not "How qualified is the individual?" but "Who will work for the least amount at the lowest rank?" I recognize that an assault on tenure would send shock waves across the entire profession and destabilize many institutions. Surely, it would invite abuses of administrative power such that some who are presently employed would be ousted for the wrong reasons. I suspect that the population of sycophants would multiply as currying favor with administrators becomes perceived as indispensable; imagine the burden on already overtaxed livers as expediency dictates the social calendar. Finally, it may seem irrelevant to pick a fight with unions over tenure since they did not invent it.

Nevertheless, I am unpersuaded that the balance between job security and quality cannot be struck more carefully. It is a fact that tenure, in practice, shelters some who should not be sheltered. Perhaps this need not be; perhaps, if administrators had more backbone, they could purge the faculty of that segment to whom tenure is a euphemism for early retirement, and who have long since lost their curiosity and pride. No doubt administrators are dissuaded from such a course due to their expectation of a swift rebuke from the faculty who interpret dismissal of anyone with tenure as strictly <u>verboten</u> and as an act of war. I do not accept the principle that in order for anyone's job to be reasonably safe, he must be immune to its loss under all circumstances. I do not believe that one should reward behavior that is irresponsible or outrageous. We in the academic community who pride ourselves on our objectivity and detachment should be able to explore ways to assure that tenure is not abused and that tenure is compatible with an expectation of continuing industry. In other words, there is a need to reevaluate tenure in theory and in practice. If this is to happen, the initiative almost certainly must come from faculty and not administration. Otherwise motives would be suspect. Rethinking tenure could avoid a frontal assault on it, with its possible disapperance in some places. Rethinking tenure could lead to administrators and legislators ceasing to complain about an institution being "all tenured up" as though the entire faculty were senile. I am idealistic enough to believe that a path can be carved out which meets both a test of justice and a test of professional propriety. I believe that we can retain the advantages of tenure while at the same time diminishing its disadvantages. I suggest that there are work standards more rigorous than those now enforced which should persist after the conferral of tenure. It is time to discuss openly the standards which tenured faculty should meet such that the condition for just cause dismissal is satisfied if

they fall short of them. The point I made earlier about evaluation is relevant here as well; all of us cannot be excellent, but all of us can do better, and all of us can strive more fully to do the best it is possible for us to do. To the extent that unions have reinforced and strengthened tenure, they bear a measure of blame for its flaws and their adverse impact on the quality of the faculty and their work. Enlightened unionists should not object to a reappraisal of tenure.[6]

Administrations and Quality

Any experienced faculty negotiator can recount stories of resistance by the administration to directions which would upgrade the quality of faculty, programs, or courses. Any example will be helpful. In one university recently the administration departed from past practice when it began to appoint holders of doctorates at the rank of Instructor instead of Assistant Professor. Almost immediately department chairpersons and search committees encountered two problems in recruiting individuals to fill a vacancy or assume a new position. Many qualified persons showed no interest at all in an interview, especially those in mathematics, computer sciences, engineering, and business; many of those who showed interest initially withdrew their applications when they learned that they could not earn tenure at the rank of Instructor at the institution. A pattern developed wherein the strongest candidates were lost. Those who accepted an appointment under terms set by the administration did so with misgivings and out of necessity since they lacked other offers. Aware of the problem, the union entered a round of negotiations with a proposal to establish the rank of Assistant Professor as the minimal rank offered to holders of doctorates at initial appointment. Presuming that the administration had adopted the new policy to counteract what it perceived as an overly generous number of annual promotion opportunities established in the labor agreement, the union was prepared to offer concessions which would modify contract provisions so as to diminish the number of annual promotions and slow down the rate of progression up the ranks. The administration negotiators declined even to negotiate the issue, arguing that it was unprepared to erode any further its managerial rights and prerogatives over terms of initial appointment and that this subject is not a mandatory subject of bargaining under law or conventional practice. When union negotiators inquired as to why the administration would not rectify the situation unilaterally, then, since nearly everyone on campus seemed to believe that the policy in question was adverse to the interests of the institution, the administration merely gave a mechanical reiteration of its stand. Thus, as this example shows, there are limits to what unions can do in behalf of quality, limits set by the administration, not the union.

Open Enrollment

Open enrollment is a mixed blessing. On the one hand, making education available to every American who is able and anxious to pursue it is an objective which every educator should embrace. This principle of maximum feasible access serves the interests of unions, too, in that greater numbers of students mean greater numbers of jobs. Also, when one is

tempted to restrict access, one should ask whether the current level of public support would last; surely the prospect of one's children attending a public institution at relatively low cost in an inducement to a taxpayer to subsidize public colleges and universities. On the other hand, open enrollment necessitates extensive and costly remedial programs. In public institutions there is typically an unpublicized College of Remediation which absorbs a considerable portion of resources, both in dollars and manpower. One wonders whether this is appropriate. Should colleges and their faculties be engaged in instruction for many students who perhaps should not be in college at all? Should those with massive deficiencies in reading, writing, and math be admitted even conditionally? At what point does higher education disappear as both money and manpower are diverted to lower education in an institution? Realistically, I doubt that one can expect more rigorous admission standards in our public colleges and universities. Realistically, I doubt that the burden of remediation will pass. Nevertheless, supporting its College of Remediation limits an institution's flexibility and has implications for the quality of its programs and courses. Here too there is a limit to what unions can do in behalf of quality, a limit over which they have very little control.

Superstars and Stars

Every faculty has a handful of extraordinary individuals who achieve prominence in their discipline, who publish extensively, and who are mobile. Can it be argued plausibly that unions have disadvantaged such superstars? I think not. In many cases superstars are counted among the union's staunchest advocates. Robert Lekachman at the City University of New York and Robert Paul Wolff at the University of Massachusetts come to mind. As a rule one hears few complaints about the union from superstars. Typically they move up the ranks very swiftly and reach impressive salaries quite early in their careers. Some hold endowed chairs, a practice both permitted and encouraged by faculty unions. Most earn extra income from royalties and the lecture circuit. They benefit in psychic income from their prestige and status. Superstars and unions coexist very well indeed.

This is not to say that everyone in a faculty reveres the union. On occasion I have heard complaints from individuals to the effect that they have suffered at the hands of the union because the union has caused resources to be spent on the mediocrities in the faculty. Needless to say, the complainants perceive themselves as "stars," if not superstars, and bemoan the lack of recognition of their obvious merit. An across the board increase they take to be an act of thievery. Now, if such persons are in fact extraordinary, contracts provide a variety of ways to recognize merit, as I explained earlier on the topic of incentives, including rapid promotion with accompanying increases in base salary, designation as a Distinguished Professor with an accompanying stipend, and in some instances a supplemental salary increase for merit, among others. This would seem to be sufficient to dispense justice. Nevertheless, some disagree. To these I ask first whether they are as deserving as they believe themselves to be. In a typical faculty everyone is extraordinary. Just ask each one; no one admits to being merely ordinary. How insulting it would be to be ordinary! The extraordinary include those who list an

appearance before the Kiwanis as a major credit under research and scholarship and whose student ratings hover at ground zero. A published article catapults them into the ranks of superstars. In such cases we need what no union can deliver - a dose of humility. I ask next whether such complainants would be better off in the absence of the union. Would the obvious merit be carefully and accurately identified, and compensated properly, to their satisfaction? A glance at non-unionized campuses, especially those where administrators dole out raises based solely on merit, will, I believe, disabuse anyone of such expectations. As soon as Professor X learns that Dean Y gave Professor Z $150 more, Professor X will characterize the Dean's parentage the same as he now characterizes the chief negotiator's. One last consideration on this point - if a union on a particular campus were to disappear, and the administration were able to parcel out raises unilaterally, or a peer committee became involved, would the sum total of raises across the faculty be equal to the amount dispensed under union pressures? I doubt it. Thus, in the absence of the union, it is unlikely that those who deem themselves extraordinary would benefit more as individuals, or that the faculty as a whole would be better off financially.

Greed and Institutional Welfare

I referred just now to union economic pressures. An obvious question needs to be asked now. Do unions harm institutions by compelling administrators to spend inappropriate amounts of funds on salaries and fringes to the institution's detriment? It should be remembered that unions are an important factor in securing adequate funding. The present dilemma would be worse across the nation were teacher unions to suspend their efforts in political action and public relations. Next, although I find fault with them for reasons expressed earlier (see footnote 4), most studies conclude that unionization has little if any appreciable bearing on faculty compensation. Presuming for the moment that such studies are accurate, it follows that unions cannot be faulted for impoverishing institutions as a rule any more than they would be impoverished in the absence of unions.

Faculty should expect to be paid a fair wage in all institutions. Administrators who shape budgets must never forget this, whether their institution be unionized or not. Nevertheless, if the survival of an institution, or the maintenance of a minimally acceptable standard, requires an economic sacrifice by the faculty, I am confident that they will make it. If the option is either a raise, or a) maintenance of accreditation, b) purchase of badly needed equipment, c) survival of the foreign language department, etc., a faculty union will do without the raise. Yet such agonizing dilemmas are extremely rare; one must view them as merely hypothetical. Should they materialize, however, teacher unions are as amenable as industrial unions to acquiescing in economic concessions for the welfare of the enterprise.

Accreditation

I want to shift the discussion now to unions and accreditation. Union leaders, as faculty in general, support

the principle that academic programs should be duly accredited. Here they reflect professional concerns, viewing accreditation as a measure of a program's quality, and self-interest, in that loss of accreditation is tantamount in some cases to termination of the program with a resulting loss of jobs. I know of not a single instance where a union was responsible, directly or indirectly, for a failure to secure accreditation, or an eventual loss of accreditation.

This is not to suggest that all accreditation societies delight at the existence of a union on a campus. For example, on my campus recently one of our beleagured professional schools underwent an accreditation review. The report concluded that the administration should take a series of dramatic initiatives to strengthen the faculty and the overall program as a condition of extending accreditation beyond a future date that was cited. In enumerating the school's problems, the report fingered the union as the culprit based on a hasty and superficial interpretation of the contract, and interviews with faculty historically hostile to the union. No one in a high position in the administration put any credence in the claim that the union deserved blame for the school's deterioration; indeed, according to my sources, the administration itself challenged the thesis in its response to the preliminary report. Initially I suspected that the visiting review team had committed the post hoc, ergo propter hoc fallacy - since the deterioration followed the emergence of the union, it was caused by the union. However, long time members of the faculty explained to me that many of the very same problems cited in the report had been mentioned in pre-union accreditation reports. Presuming that the review team had access to previous reports, one can only conclude that this particular team, and possibly this particular accreditation society, harbored a bias against collective bargaining. Ironically, the review team chose not to meet with union leaders, and either was ignorant of or unimpressed by widely publicized efforts by the union in recent years to highlight the need for corrective action in the school.

Based on this experience, and others, I wish to suggest several practical guidelines for union leaders, administrators, and accreditation groups.

1. Many accreditation societies have a rule that only university officials may be privy to their accreditation reports. Union leaders are not interpreted to be university officials. This should be changed. If there is a problem, and if the union is perceived to be part of it, the union should be told. Further, on a unionized campus an accreditation review team should meet with union leaders as part of its study and investigation. Surely a union should not be tried and convicted without even meeting its accusers or having the opportunity to hear the supposedly damaging evidence. Precious few campuses, once unionized, revert to non-unionized status. From this it follows that accreditation societies must learn to deal with unions as a given for the foreseeable future. Unions are not an aberration in higher education, an unwanted or uninvited house guest soon to depart.

2. While union leaders must adopt a stance in support of accreditation, they should not be expected to sign a blank

check. In the first place, it should be kept in mind that an accreditation review team comes both to measure and to change. It is a lobby which aims to bring pressure upon the institution to respond more fully to a special interest. I remember an exit interview which sounded like a doctor detailing for his patient the nature of his life threatening disease; from what I could see, the patient had nothing more than a mild case of flu. In the second place, it is possibe that demands in one segment of an institution may be so costly as to require a reappraisal of a program before the demands are met. If accreditation is not absolutely essential to a program, if it can survive and prosper without it, the prudent course is to forego it. If, however, accreditation is absolutely essential to a program, if it cannot survive and prosper without it, both the administration and the faculty are obligated to balance the benefits of accreditation against the costs elsewhere in the institution. Though it is highly unlikely, one could end up with a mansion in a ghetto. If the administration chooses to terminate a program because of excessive costs, union leaders should support their decision. Despite the short term loss of jobs, if any, the institution's solvency will be assured and resources will be freed up to improve compensation across the entire bargaining unit and to upgrade programs elsewhere. In summary, then, there is a need for the administration and the faculty to evaluate both the evaluators - the study team - and their evaluation - the preliminary and final reports.

3. The securing and retention of accreditation require a considerable, though not absolute, degree of administrative flexibility. For instance, the union should not object to the administration setting the salary and rank of each new appointee, provided that it is beyond prescribed minima set down in the contract. Also, a union should be prepared to agree to a dual standard in salary and workload as a condition of securing or retaining accreditation in a program in which accreditation is essential. This flexibility is essential if the institution is to come to grips with the realities of the academic labor market. From the perspective of the dismal science, faculty are heterogeneous creatures. Provided that the contract lists the criteria for special adjustments, the administration should be permitted to grant them. For instance, if engineering faculty are bailing out for more attractive offers elsewhere, the administration should have both the right and the obligation to halt the trend by raising salaries among engineering faculty as necessary. This does not mean that the union should be expected to permit the administration to distribute 10% of the pie in across the board salary increases and 90% in selective ones. Depending on the attendant circumstances, a union may agree to other provisions, including the following: 1) specifying that salary increases are "no less than '$x'," with an option for the administration to sweeten the pot selectively for contractually sanctioned reasons; 2) negotiating a supplemental increase to accommodate market factors affecting a segment of the bargaining unit such as computer scientists; and 3) establishing temporary arrangements, such as a lower than usual threshold for overload pay, which can be normalized subsequently, allowing a group of faculty to earn extra income for carrying the usual course load, or to undertake research and publication projects. This last scheme avoids inflating base salaries "artificially" on a permanent basis when there are prospects for a relatively quick shift in market conditions. There are many other measures which can be suggested to which union leaders should be

amenable in principle.

4. The administration and not the union should take the lead in securing or retaining accreditation. The union should be flexible and cooperative if contract provisions need to be amended. Union leaders should own up to a problem and be ready to take the heat if necessary. Nevertheless, in that accreditation may generate or dramatize conflicts of interest among segments of the faculty, the resourceful president or provost should understand the reluctance of a union leader to beat the drum for accreditations here or there; if the unionist is overly solicitous of the few, he will be suspect by the many. If this fellow representing all of us? They may ask. If necessary, the union leadership should be given the privilege of agreeing "reluctantly" to a proposal urged upon the union by the president or provost. In addition, if the union leader were to take the initiative, he could also alienate administrators by seeming to occupy their role or implying that they are unconcerned about the quality of the institution's programs.

Conclusion

In closing this extended discussion, let me guard against a possible misinterpretation of my arguments. In essence I have argued that unions are not dysfunctional in respect to the quality of teaching and learning on a campus. Stated differently, unions produce more benefit than harm as a force in education. Yet their legitimacy does not turn on their utility. Faculty, like other employees, have a right to bargain collectively if they choose to do so. The right to bargain collectively should never be predicated on the claimed utility or disutility of a union. This principle begs for a lengthy exegesis which will have to wait for another time. I state it now so as to avoid any misinterpretation by my audience.

Footnotes

1. I have discussed political and public relations aspects of faculty unionism in a previous conference. See the Proceedings of the National Center's Second Annual Conference, 1974, for "Collective Bargaining on the Campus - the Tip of the Iceberg."

2. Quoted from Arthur J. Minton and Thomas A. Shipka, Philosophy: Paradox and Discovery (New York: McGraw-Hill Book Co., 1982), second edition, p. 377.

3. On resistance by faculty to mandatory evaluation, see A. Kronk and T. Shipka, Evaluation of Faculty in Higher Education (Washington, D.C.: National Education Association, 1980). On problems associated with peer evaluation, see the exchange between Dr. Irwin Polishook and myself in the Proceedings of the National Center's Fifth Annual Conference, 1977, and my "The Crisis in Peer Review," The Advocate, National Education Association, May, 1978.

4. Studies of the impact of unions on salaries tend to the view that unions have little if any measurable impact on improving salaries. Most of these studies contrast salaries at unionized institutions with those at non-unionized institutions, and find no appreciable difference between the two groups. There may be a methodological flaw here. Non-unionized institutions may raise salaries to discourage unionization and to retain their faculty who might otherwise be tempted to transfer to unionized institutions where the terms and conditions of employment are better. There could be a leap-frog effect whereby non-unionized institutions follow a pattern of waiting until unionized institutions negotiate a raise, and then match or exceed it immediately or in the ensuing year. Two informal studies I have seen cite this very effect in the salary trend among Ohio's universities, with the University of Cincinnati and Youngstown State University typically establishing the percentage raises which the other institutions proceed to match or exceed. If future studies would focus on the dynamics of salary determination instead of merely salary figures, the actual impact of unions on salaries might become more clear.

5. Although I support these practices, I am skeptical about incentives. I believe that the impact of financial and prestige incentives is exaggerated in higher education. I doubt very much that they prod individuals to take the extra step, so to speak. The highly productive faculty I have met over the years enjoy their work and take pride in it; this, more than material incentives, accounts for their output.

6. For a more extensive discussion of tenure, see the Proceedings of the National Center's Seventh Annual Conference, 1979, for papers by Margaret Schmid and Margaret K. Chandler.

6. THE INDUSTRIAL MODEL OF ACADEMIC COLLECTIVE BARGAINING

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Employee Rights and Collective Bargaining

In law, the relationship between employer and employee is traditionally referred to as the "master-servant" relationship. Although employer and employee are free to discontinue this relationshp at any time, and re-enter the market in order to improve their situation, it is recognized that the employer brings more power to the bargain than the employee. The employer unilaterally sets the terms and conditions of employment, and the employee accepts those conditions or seeks employment elsewhere. The individual employee has very little power to negotiate terms and conditions of employment. If the labor market is strong, providing sufficient demand for the skills of the employee, he can improve the conditions of employment by finding employment elsewhere. If the labor market is weak, and the employee's skills are not in great demand, he must accept the terms and conditions set by the employer. In only rare instances can the employee directly improve the conditions of employment through negotiation with the employer.

This does not mean that an employee cannot advance and improve his position at the place of employment. It only means that the terms and conditions for that advancement are set by the employer, and the employer makes the unilateral decision which the employee must accept.

The employer's control is complete. He sets the pay scale, determines the standards for promotion (and who gets promoted), decides how and when and where the work is to be done, hires and fires and disciplines employees, and otherwise has complete control over the operations of the establishment.

The disproportionate power which employer and employee bring to the employment bargain can easily be explained. There are far more employees than employers, and the typical employer has many prospective employees from which to choose. The employer can easily survive the loss of a single employee. The employer has power; the employee does not.

In 1935 the National Labor Relations Act sanctioned the right of employees in the private sector to negotiate collectively in order to improve the terms and conditions of their employment. The law recognized that a single representative for all employees would bring far more strength to the bargaining relationship than could be mustered by a single employee. Collective bargaining could bring to employees what individual bargaining could not.

The fruits of collective bargaining are memorialized in the collective bargaining agreement. For our purposes, the most important features of this agreement are referred to as the "four squares of the agreement", the features which clearly delineate the relationship between the parties.

1. Recognition. The employee recognizes the union as the exclusive bargaining agent for all employees with respect to wages, hours and conditions of employment.

2. No strike/no lockout and grievance and arbitration. The parties agree that all disputes arising from differing interpretations of the agreement will be settled in the grievance procedure with binding arbitration by a neutral third party as a last step in that procedure. Pending settlement of disputes in this fashion the parties further agree not to engage in "self-help", i.e., strike or lockout to force the other side to relinquish its position.

3. Management rights. The employer is free to manage the enterprise as he sees fit except as limited by a specific provision of the agreement.

4. Past practice and "zipper" clause. All past practices and agreements are rendered null and void and the parties further agree that the collective bargaining agreement encompasses the entire relationship between the parties and that each party waives all matters which could have been proposed but were not incorporated into the agreement.

Within these four squares--or corners--of the agreement the parties will negotiate the remaining terms and conditions of employment. These will typically include due process provisions for all employees who have passed their probationary period. To be specific, once an employee has passed the probationary period, discipline or discharge can only occur on the basis of the just cause principle as defined by arbitration case law. The employee has a right to the job, and employment security is guaranteed by due process. The master-servant relationship has come to an end. Due process is protected by the grievance and arbitration procedures, which are the heart of the collective bargaining agreement. If the employee and/or the union believe that the employer has not met his obligations under the collective bargaining agreement, they may protest the employer's actions. If the dispute cannot be resolved in the grievance procedure, then the parties have recourse to arbitration. The arbitration procedure is recognized under statute, testimony is taken into evidence under oath, witnesses may be subpoenaed and compelled to produce documents, the proceedings are conducted according to standards and norms roughly equivalent to a court of law, and the arbitrator's decision--based upon evidence and argument--is final and binding.

Faculty as Employees

Now, most faculty don't like to think of themselves as employees. They prefer to be called "professionals" and compare themselves to physicians and lawyers. The terms and

conditions of employment for physicians and lawyers, however, are determined by the fact that most physicians and lawyers are self-employed and/or eventually achieve partnership status in a professional corporation. The terms and conditions of employment for the minority of physicians and lawyers who are employees are largely determined by the terms and conditions of the majority who are self-employed. Not so with college professors, whose terms and conditions of employment are determined by the vast majority who are employees.

Faculty's confusion over their status, and confusion over the work "professional," stems from the transfer of their notion of the kind of work they do to their employment status. Faculty believe that because they do the work of "professionals," they are "professionals." Ultimately, however, a profession is a vocation, and truck drivers have been known to refer to themselves as "professionals." Doctors and lawyers are professionals, and also managers by virtue of their ownership of a business. College and university faculty are also professionals, but they can never be managers because they don't own the business. They are employees.

The confusion of "professional" with "manager" has led faculty to expect to play a determinative role in managing the affairs of the university. Indeed, during the twentieth century, and especially since World War II, university and college faculties succeeded in developing a system of "shared governance" in American higher education. This system of shared governance, sometimes referred to as collegiality, had the following principal features:

1. An academic or faculty senate. Charged with deliberating on academic issues and making recommendations to the university administration, the senate's recommendations were rarely reversed.

Unfortunately, there existed a large gray area of issues touching upon academic affairs, which administration often kept outside the jurisdiction of the senate. Major financial and budgetary decisions are a good example. Often, decisions affecting the academic direction of the institution were kept away from the senate: For instance--a decision whether or not the university should embark upon a continuing education program.

2. Committees. A large number of standing and ad hoc committees flourished along with the senate, of which the curriculum and personnel committees were most important. Like the senate, the committees' recommendations were usually acted on by the administration.

3. Peer Review. Faculty passed judgment on the qualifications of their colleagues for purposes of promotion, retention and tenure. The recommendations of the peer review committee were advisory, although usually supported by the administration.

Decisions regarding promotion were usually not subject to appeal, but a probationary faculty member who had been denied

tenure could appeal such a denial to a standing hearing committee which would then review the denial on procedural rather than substantive grounds. This usually involved a question of whether or not the applicant for tenure had been given "adequate consideration", i.e. had the peer review committee conducted its business in a conscientious manner?

Tenured faculty who had been dismissed for cause were provided a hearing on the substantive issues. The hearing committee's decisions, however, were subject to administrative review or review by the institution's governing board.

This structure of governance gave the impression of shared authority, although it was really only a system of shared responsibility. Collegiality meant that faculty collaborated with administrators in conducting some of the key academic affairs of the university, such as curriculum and personnel matters, but that final authority rested with the administration or governing board. Rarely, if ever, did the university give its faculty the final determinative decision.

A number of other features must be mentioned. Rules and regulations were generally reduced to a faculty handbook, incorporated by reference in the faculty member's annual contract. This faculty handbook not only contained the rules and regulations governing the faculty, but also described the system of shared governance and collegiality outlined above. There was no final and binding system of due process incorporated in this arrangement, however, and a faculty member was compelled to go to court in order to enforce his contractual rights. Thus, a faculty member who was dismissed for cause from a tenured appointment was obliged to seek redress in court at his own expense should the administration or the governing board uphold his dismissal or overrule a faculty committee which had found in his favor.

Also, if a faculty member had been accorded peer review, there was no due process procedure to protect the faculty member from his peers. A faculty member was subject to the decision of his peers, especially if upheld by the administration, regardless of whether the decision of his peers had been informed or fair. Worse yet, the peer review process often worked under a cloak of confidentiality, thus preventing the faculty member from reviewing decisions to deny him promotion or tenure or subjecting him to discharge.

Now, the system worked well enough during the rapid growth of higher education in the 1950's and 1960's. Faculty positions were opening rapidly, and faculty working conditions and salaries improved significantly. Collegiality flourished, too.

Thus, many faculty believed they had a determinative role in the conduct of university affairs, even though their input was merely consultative. By the 1970's, however, universities were being subject to increasing economic pressures. In response to this pressure, university administrations often acted outside the framework of collegiality or shared governance when they felt their financial survival threatened. At the same time, faculty security eroded as the number of

positions available relative to the number of qualified faculty shrank. Tenure and promotion became more difficult to obtain and the use of non-tenure track and part-time positions grew. As real incomes of faculty fell, both relatively and absolutely, faculty turned increasingly to collective bargaining.

Recourse to collective bargaining, however, was dealt a severe setback with the Yeshiva decision. Faculty had realized, in their drive to collective bargaining, that their role in institutional governance was not sufficiently strong to provide them the financial security and control over their working conditions which they required. Yet, they had succeeded so well in developing the appearance of shared authority that the court prohibited access to the only means of collectively addressing their most urgent needs.

This left faculty in a kind of "no man's land." They had gained the trappings of managerial position without any of the true authority of managers, preventing them from having any real say in their destinies.

The USF Faculty Association

When faculty and librarians at the University of San Francisco adopted collective bargaining in 1975, one of their objectives was to gain a greater share in managing the affairs of the University and strengthen peer review. All of the institutions of shared governance were in existence, but their strength had been eroded by the administration as it coped with a series of financial crises.

During the first two annual rounds of negotiations, the union came to realize that if it wanted to manage the affairs of the University it would have to buy the University. Failing that, the best that faculty and librarians could hope for was to bargain for, obtain and guarantee due process and contractual protection for their most important working conditions.

Ironically, Yeshiva's faculty had attempted to organize before the University of San Francisco's. Fortunately, the University of San Francisco never raised objections of the kind raised by Yeshiva University.

The collective bargaining agreement at USF is an industrial model agreement and incorporates the key features of the typical labor agreement outlined earlier. The "four-squares" of the agreement are covered by a recognition clause, a management rights clause, no strike/no lockout and grievance and arbitration clauses, and past practices and "zipper" clauses. Job security and due process are provided and a multitude of working conditions are stipulated in the agreement. In addition, access to grievance and arbitration over lay-off of tenured faculty and librarians under all circumstances is included.

The agreement also contains a "union shop" clause. All

faculty and librarians must join the union. This means that the faculty and the union are one. There are no separate institutions, committees, organs, or bodies dealing with faculty affairs which exist outside the union. The democratic institutions of the union are the only voice of expression for the faculty. All of the old committees and the senate have been dismantled and have passed out of existence. If the University administration wishes to discuss any aspect of wages, hours or conditions of employment, it must go through the union, and there is virtually no aspect of faculty affairs or activity which lies outside the scope of the "conditions of employment."

The USF Faculty Association, according to its constitution and bylaws, is an amalgam of traditional faculty structures, structures necessitated by the organization of the University, and structures dictated by the needs of the union. The union has a five-person executive board composed of the officers of the Association and charged with carrying out policies determined by a twenty person policy board elected on a proportional basis from each of the schools and colleges of the University. The faculty's affairs in each school and college are conducted according to a set of bylaws which make those affairs an integral part of the union's activities. In addition, there are a number of union committees dealing with the traditional concerns of faculty, such as curriculum and program, research, etc..

Peer review has been abandoned in exchange for due process. Faculty are not called upon to evaluate their colleagues. Rather, standards for promotion and tenure have been negotiated and are included in the collective bargaining agreement. The deans and the academic vice-president make all decisions with regard to tenure and promotion subject to the faculty member's right to protest and appeal a negative decision through the grievance and arbitration procedure. The University of San Francisco is probably the only college or university in the country where a faculty member has access to grievance and binding arbitration over denial of promotion and tenure.

The grievance committee of the union, which acts as the faculty member's advocate, does not judge the qualifications of the faculty member, but rather processes the faculty member's case through the grievance procedure in order to obtain the best possible result for the faculty member. This does not mean that every case is automatically appealed to arbitration. The majority of cases are settled short of arbitration, with the faculty member understanding clearly what is expected of him and having a stipulation with regard to future performance necessary for promotion.

Tenured faculty and librarians are also protected by due process in the event of dismissal for cause. They need not go to court, but have access to grievance and arbitration.

Economic layoff of tenured faculty and librarians is also subject to grievance and arbitration. Even a claim of financial exigency does not remove this burden from the University. The University must prove to the arbitrator that it has grounds for laying off a tenured faculty member or librarian. In addition, any faculty member subject to layoff

has five year recall rights.

Academic freedom is included in the collective bargaining agreement, and faculty allegations of denial of academic freedom are also subject to grievance and arbitration. The academic freedom language of the collective bargaining agreement is very broad and has been successfully tested by the union. The case involved the University's right to deny access to certain courses by faculty on ideological grounds. It has been of the utmost importance to faculty that their academic freedom is subject to the test of grievance and arbitration.

The language governing curriculum and program is the most important flaw in the agreement. The administration is required to wait 45 days before implementing any major curricular change, during which time the union may forward its consultative remarks to the administration.

As a practical matter, departmental curriculum change and development is still handled at the department level--the lowest unit of organization within the union--and this is protected by the academic freedom statement. In addition, the union's curriculum committees oversee the development of College and University-wide changes. This is not mandated in the agreement, however, and thus remains a flaw to be corrected.

Collective Bargaining: Industrial Model vs. Collegial Model

Why is the collective bargaining agreement at the University of San Francisco referred to as an "industrial model" agreement? For two reasons: (a) all terms and conditions of employment are reduced to the collective bargaining agreement and the university recognizes the union as the exclusive bargaining representative for all faculty and librarians, and (b) due process has replaced peer review.

In the collegial model, with a collective bargaining agreement, many of the terms and conditions of employment are left out of the collective bargaining arena and peer review is the norm in all personnel matters.

The union's activities are largely confined to economic matters, and an academic senate and a committee structure are used to address other issues. This tends to divide the strength of the faculty and play into the hands of the administration. Who speaks for the faculty? The union? The senate? A committee? To whom are the senate and the committees accountable?

Peer review places the primary burden of evaluating faculty upon those least capable of making an objective judgment--the faculty member's colleagues. Would we ever permit a jury of our peers to judge us in court unless it was a jury of perfect strangers? Faculty cannot evaluate their colleagues objectively because they have made a subjective evaluation in the course of their working relationship.

If faculty bargain for due process--grievance and arbitration--in the context of peer review, against whom is the grievance directed? Should the aggrieved faculty member protest the action of his colleagues--fellow union members--or that of the administration which has supported the action of his colleagues? Can the union carry a grievance against itself? And if the administration supports the result of the peer review process, doesn't this hamstring the rights of the faculty member denied promotion and tenure?

Faculty must recognize that their interests are best served by molding the situation on campus to the needs of collective bargaining, rather than attempting to mold collective bargaining to the shape of things on campus.

Faculty at the University of San Francisco "backed into" the industrial model when they discovered that the administration would never cede the right to manage the University. Indeed, the administration insisted the matter was not a mandatory subject of bargaining. Gradually, the faculty gave up the attempt to share authority with the administration and instead began bargaining for those working conditions which would provide security and dignity. These were incorporated in the collective bargaining agreement.

The employer-employee relationship is adversarial by virtue of the power the former exercises over the latter. The collective bargaining relationship, as an extension of the employer-employee relationship, is also adversarial. Yet an adversarial relationship is not a hostile relationship. It can be hostile, but it can also be one of accommodation and mutual respect.

When a faculty turns to collective bargaining, an adversarial relationship is not created--it was always there. If accommodation and mutual respect prevailed before collective bargaining, they can prevail after the faculty organize.

Shared governance and collegiality disguise the adversarial relationship when the university is growing and employment opportunities for faculty are numerous. When times turn hard--as they did in the 1970's--shared governance and collegiality are exposed as facades. The relationship between faculty and administration can become hostile even while some faculty insist that it need not be adversarial. It is then that faculty realize that the "gentleman's agreement" has been broken, and it is then that faculty realize the powerlessness of their situation. They turn to collective bargaining, as many other employees have under similar circumstances.

Given the Yeshiva decision, faculty can place themselves in the best possible position to begin a collective bargaining relationship by abandoning the trappings of shared governance. Why be hoisted on one's own petard? Why struggle for the false semblance of authority only to be told later that veneer is substance and that negotiating for one's rights is now precluded?

If collegiality worked, would so many faculty have turned, and continue to turn, to collective bargaining?

7. THE USE AND ABUSE OF PART-TIMERS - I: CASUAL EMPLOYEES SCABS OR SAVIORS?

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Introduction

The traditional university had ivied walls, classrooms comfortably full of young students and a staff of full-time, greying male professors whose ranks numbered pretty much the same year after year.

All that has changed. The changes have, I think, been for the better: better for the students, better for the kind and quality of education provided by our universities and better for the instructors themselves over the long pull. The changes have resulted from inflation, a shift in the student mix away from 18-to-22-year-olds toward older students who work during the day, a resulting increased need for evening courses and alternative curricula and a de-emphasis on the traditional liberal arts education.

To their credit, our universities have responded to the need for change. Courses are different; calendars are different; and--perhaps most visibly (and certainly most importantly in terms of our inquiry today)--the composition of the university faculty is different. Don't get me wrong: our archetypal full-time senior faculty member hasn't been replaced. He is simply no longer all there is. For the first time, universities have faculties balanced among full-and-part-timers--just as, for the first time, their student bodies are balanced in exactly the same way.

Two Part-Timer Categories

The State University system generally categorizes part-timers in two ways: "Casuals" (adjunct faculty members who teach one or more courses on a fee-for-service basis), and "pro-rata part-timers" (whose benefits are pro-rated in proportion to the number of hours they work, and whose work is likely to be multi-dimensional--teaching, advising, researching, participating in governance processes and so on). "Casuals", like other independent contractors, are paid on a fee-for-service basis. The system of compensating casuals is, of course, separate from the contract with United University Professions, the union representing the State University

system's teaching and non-teaching professionals. Pro-rata part-timers, on the other hand, are members of the professional staff negotiating unit and share the benefits and responsibilities of negotiating unit membership.

Use Justified

Use of these part-time faculty is not only justifiable, but necessary if today's university is to meet the educational needs of the public it serves as well as its all-too-real financial responsibilities to those who pay the bills--in the case of a public university like SUNY, the State's taxpayers.

Inflation has increased the costs of higher education tremendously while shrinking its financial resources. State governments are cutting budgets and raising taxes. Reductions in direct federal support for colleges and universities are coupled with cuts in federal aid and loans. It is a matter of simple arithmetic that part-time faculty, with course assignments and schedules tailor-made to the institution's particular program needs, cost less than full-time faculty whose skills and schedules may not mesh precisely with those needs. It is likewise obvious--if somewhat painful to the relatively few academicians who would apply traditional trade-union theory to higher education--that it costs less for a public university to hire adjunct faculty than to go with full-timers generally covered by collective agreements, who carry with them not only higher salaries, but a huge fringe benefit overlay as well.

Particularly in difficult fiscal times, institutions need to respond quickly and efficiently to shifts in enrollment, budget cuts and changes in student interest. The tenured full-time work force simply does not have the flexibility to allow such a response. Thus the only practical alternative to part-time faculty may be the layoff of tenured faculty in a program area suffering declining student interest and the hiring of other faculty in areas of higher program priority. The problems with that course of action are obvious: It is inconsistent with the expectations which accompany tenure, anathema to unions interested in the job security of those they represent, disruptive of the educational program and governance structure and, in view of notice requirements which are frequently imposed by collective agreement, cumbersome to the point, in larger institutions, of administrative paralysis.

In fact, Morton S. Baratz of the American Association of University Professors states the case this way:

> "A substantially tenured faculty is a heavy burden for an administration that is having severe fiscal difficulties. For the price of one tenured professor, the institution could hire two untenured assistant professors--or ten part-timers. Were it not for the tenure system, changes in the faculty/student ratio could be swiftly effected, as could the demographic composition of the faculty. And were it not for tenure, shifts in students' demand for courses and majors could be readily accommodated at minimal cost."[1]

The fact is that the use of part-timers allows flexibility to provide instruction in emerging disciplines and to accommodate unexpected student demands. These shifting demands may not justify hiring full-time tenure track appointees with, as I have said, bouquets of fringe benefits. By way of example, I invite your attention to the trend in the 1960s to hire full-time tenured faculty in emerging areas such as Black Studies, Women's Studies and Environmental Studies. The faculty who were hired then have, in many cases, been laid off as student demand reverted to business management and other traditional fields.

Student populations are changing dramatically. An increase in the number of adult[2] part-time students has accompanied a drop in the number of traditional 18-to 22-year-old college students. Some of these adults are returning for retraining after layoffs. Others are keeping pace with new technology in their fields. As a result, there is greater emphasis on continuing education, ranging from non-credit study to traditional courses at untraditional times.

Most courses aimed at adult part-time students are necessarily conducted in the evening. But full-time faculty don't usually work evenings, and don't usually want to work evenings. Typically, night courses are taught by individuals with practical, rather than solely theoretical, experience[3]--sometimes individuals from business and industry[4] whose experiences are likely to be highly relevant in a practical sense to this student population.

Similarly, employment of part-timers is heavy in community colleges and two-year schools, which have experienced enrollment leaps as part of the demand for vocational education. In fact, 52.6 percent of all part-time faculty in post-secondary institutions are employed in two-year colleges.[5]

Retirees from academe, business and industry seek part-time teaching opportunities. An expert professional may wish to teach one or two courses as a community service or for the satisfaction of relaying expertise to students. Should the university reject his or her offer to do so, at nominal cost to the student or taxpayer, solely because it does not fit the traditional academic model?

This is not to pretend, by the way, that all part-time employees are there by choice. Some take part-time rather than full-time jobs because that is the only opportunity at a college with a tight budget. Young scholars with Ph.Ds in particular are victims of a shrinking job market. Spouses of faculty in college towns are among those forced to settle for part-time work because full-time jobs do not exist. But that's just the point--they don't exist, and part-time work for those who want to work is surely better than no work at all.

Demand for part-time work is recognized by the State of New York, which has issued policy directives at the highest level supporting alternative work schedules. Governor Hugh L. Carey's Executive Order No. 68 directed that alternative work schedules be encouraged in an effort to increase public service, enhance recruitment and boost employee morale. And the New York Civil Service Commission President's Fourth Annual

Report to the Governor, last fall, indicated as well that establishment of such schedules allows optimal equipment and space use and can reduce costs. SUNY has responded to these policy initiatives. It has offered, as faculty have sought, part-time employment at its 32 campuses.

Educational institutions are no exception to the theorem that the only thing certain is change. Enrollment forecasts for the 1980s vary from predictions of modest increases to modest declines. Higher costs of private education may cause enrollment dips in private institutions and corresponding increases in public institutions.

Interest in computer science, business, accounting and other management-related fields is up, and pursuit of the classic liberal arts education is down. A university may need to quickly take on three or four more teachers to handle soaring demand for business courses. It needs teachers--not researchers, not administrators, not student advisors. Part-timers offer this flexibility, as well as an appealing diversity for an institution's faculty.

Does not Imperil Full-Time Academicians

The use of adjuncts does not constitute a real threat to the job security of full-time academicians. Colleges and universities always will need a core full-time faculty. It likely will not be as large, relative to total faculty, as it once was; but it is unlikely that full-time faculty members will actually be replaced by part-timers. Why? The "core" of full-time faculty is necessary to teach, perform research and conduct scholarly work, design curriculum, coordinate program, participate in governance of the university, conduct committee work and teach the staple core curricula.

The reality is that large numbers of part-timers are already in the system. And the changing proportion of full-time core faculty is not that different from the experience in other industries. There are similarities with retailing and other service industries, for example, that have to deal with demand for service at other than 9 a.m. to 5 p.m. and rely on part-timers to cover peak periods or off-hours.

The New York State Commissioner of Education has addressed and confirmed the reality of part-time academics in higher education by regulation. He has done so, however, with an eye to the need for balance--a balance struck by re-emphasizing the importance of full-time faculty. Thus:

> "To foster and maintain continuity and stability in academic programs and policies, there shall be in each division of the institution a majority of faculty members who serve full time at the institution, except when the commissioner determines that the nature of the educational program and the expertise it requires justify a departure from this requirement."[6]

The Education Department is not entirely rigid in

enforcing these standards. For example, the performing arts is an area in which some flexibility may be desirable. Practitioners of the arts--whose campus appearances are necessarily part-time in most cases--provide valuable insight and stimulation to students. And it is unlikely most music departments can provide courses in every instrument without hiring part-timers.

Generally, though, the Education Department seriously questions departures from its guideline when it considers certification of a new academic program or department.

The Middle States Association of Colleges and Schools approaches the topic of part-timers from a different tack. In its Policies and Procedures it recognizes the value of using adjuncts for both economic reasons and for enhancing the quality and strength of academic programs. Further, as there is no precise formula for determining the balance between full-time and part-time faculty, it cautions institutions of higher education to assess the long range implications of using adjuncts on the morale and effectiveness of full-time faculty and suggests that institutions hiring part-timers take steps to ensure that procedures for assuring effective quality control are well defined and systematically applied.[7] The ticklish question, of course, remains: Just what should the relationship be between full-and-part-timers?

Role in Bargaining

The reality of labor negotiations in higher education is that part-timers--the individuals as well as the "issue"--have played only a limited role in the bargaining process. I do not anticipate that that will change.

In the State of New York, United University Professions (UUP) has directed its efforts in bargaining to the full-time staff. It has concerned itself with issues of job security, including layoff and reemployment rights, which protect full-time employees over part-time; tenure review, evaluation, grievances, compensation and benefits, improved status for non-teaching professionals, career ladders for non-teaching professionals, and the status of librarians.

Part-time issues were not at the forefront in the first years of a negotiated collective agreement for the State University of New York. There are, I think, two reasons why. First, part-timers and adjuncts are not sufficiently organized to play a major role in negotiations. They are not as involved in campus life as full-time faculty, and are unlikely to be as interested in union goals. Typically, they are not active in the union, and do not interact with their part-time peers because of differing schedules. Teaching often is a second job for adjuncts, making them less interested in fringe benefits and job security. In general, they are likely to identify more closely with their professional colleagues, with whom they deal all day long, than with their academic colleagues, whom they may seldom (or never) see.

Secondly, in the State University, pro-rata part-timers,

as distinguished from adjuncts, have long been members of the negotiating unit. They receive contractual salaries and benefits for which they are otherwise eligible, on a pro-rata basis. They perform a more or less proportional share of the professional obligation, including teaching, research, community and public service, advising of students, administrative duties, committee work, scholarly activity and other general obligations. To make a long story short, pro-rata part-timers have not been an "issue" in negotiations because they have long since been organized and integrated into the university, the negotiating unit, and the structure of the collective agreement itself.

Observing the current State-UUP negotiations and looking ahead, I do not anticipate any significant change in the parties' historical pattern of bargaining as it relates to part-time faculty. To be sure, the topic is likely to arise in negotiations, as it has in the past;[8] but I think its vitality at the table is limited to UUP's fundamental--perhaps unavoidable--ambivalence on the subject.

On the other hand, UUP seeks to have part-timers' compensation and fringe benefits increased to a level "comparable" with that of full-time faculty. On the other hand, UUP would limit the number of part-time faculty as a means (in its view) of preserving full-time faculty positions. This conflict--which is in my view irreconcilable--puts UUP on the fence when it comes to representing the interests of part-time faculty in our single SUNY professional negotiating unit. As a matter of fact, it suggests as well why adjuncts aren't in the bargaining unit at all: if the interests of adjuncts are fundamentally adverse to those of other faculty, does it not follow that they lack the "community of interest" with those faculty that their inclusion in the bargaining unit would require?

UUP is not, of course, alone among employee organizations in its ambivalence. Many express, the "threat" which part-timers pose for their long-time and, presumably, full-time members. The American Federation of Teachers (AFT), with which UUP is affiliated by its Advisory Commission on Higher Education, concedes the advantages to universities of the use of part-timers; it calls only for limiting their use "to the minimum necessary to enrich the curriculum and to enable the institution to respond to fluctuations in enrollment." The Commission has, indeed, taken an affirmative and in some respects constructive position on the use of part-timers: It says AFT should campaign to "dispel the disparaging myths" of lack of credentials and inferior service to students on the part of part-timers.

Says the AFT: "The welfare and professionalism of all faculty depend upon recognizing the status of part-time faculty and their use and abuse of colleagues. Until they are so recognized and treated with justice, they remain a potential threat to the dignity and security of the entire teaching profession."

The National Education Association (NEA) also recognizes the necessity for part-time faculty. It has said that part-timers should be hired only when full-time faculty do not

have the required training or expertise and when employment of not more than half-time is justified. NEA believes part-timers should receive pro-rated pay and fringe benefits. In addition, NEA says part-timers should not be hired for the "primary purpose" of cutting instructional budgets or reducing the number of full-time paid faculty. But NEA supports the idea of voluntary job sharing "as a means of providing a flexible employment opportunity to help meet the varying needs of teachers." And job sharing should, says NEA, be covered by the contract.

Summary and Conclusions

Generally, negotiations with unions representing the employees in New York's 10 statewide bargaining units place more emphasis than may be the norm on part-time work. A precise cause is hard to pinpoint, but factors probably include affirmative action and an increasing number of women who had full-time jobs but wished to cut back their hours because of family responsibilities. These individuals have formed an effective, if unorganized, lobby for better part-time benefits, day care to enable them to work part-time, flexible work hours and other benefits. Their presence in the work force has pressured statewide unions to seek these benefits and the State to grant them. Thus, there are in place a network of day care centers at work places across the state to accommodate children of state workers, and a variety of alternative work programs ranging from shared jobs to flexible work schedules, usually with specified core hours.

Part-timers now account for approximately 4 percent of the overall state work force. As their numbers increase and the state provides more of these part-time opportunities in all job categories, we can expect additional attention directed to benefits such as job security and tenure for these employees.

By contrast, in the SUNY bargaining unit, UUP views the increase in adjunct faculty as an erosion of its unit. That view is based on the assumption--as we have seen, incorrect and outdated--that the state would hire traditional, full-time faculty if barred from using adjuncts. But additional full-time faculty would not meet the state's fiscal imperatives, let alone the university's rapidly changing program needs. Once again to shorten the story, it simply won't happen. But UUP persists. It argues that the state should limit use of part-timers because the quality of education will decline if their use in large numbers increases.

It is my belief, however, that the quality of education is not adversely affected, but rather is enhanced and diversified, by part-timers. It also is my belief that the concept of tenure is not threatened by part-timers, and that the bulk of the faculty who teach core curriculum and perform a range of obligations will continue to exist. The system itself works to maintain quality of part-timers. The fact that the academic market place is tight means we can attract quality part-timers.

In fact, because part-timers and junior faculty tend to carry the heavy course load for teaching lower-level basic classes, their use frees up senior faculty to teach smaller

graduate and advanced undergraduate classes. Everyone gains from this optimal use of available faculty: the students at all levels, the faculty and, ultimately, the taxpaying public.

FOOTNOTES*

*The author is grateful to Jerome Gregory-Pindell and Carol Schlageter-Chady for their assistance in preparing this paper.

[1] Morton S. Baratz, "The Fiscal Outlook for Higher Education, "The Uniqueness of Collective Bargaining in Higher Education, April, 1978, p. 77.

[2] In Fall of 1981, approximately 19 percent of the State University of New York student population was over age 30, according to the State University of New York Data Resource Book, January, 1982.

[3] "Students are becoming increasingly insistent on the relevance of education to career opportunities and will become skeptical of the instructor who is unable to relate his subject to the world of work. The growing number of students who are employees will sharpen the focus of this problem." Richard R. Beman, "Observations of an Adjunct Faculty Member," New Directions for Community Colleges, 1980, p. 82.

[4] "One of the most impressive features of the community college experience has been the use of part-time faculty. They bring to the college a richness and diversity of experience that usually is not found in a full-time faculty. This is especially true in the business and industrial areas, where part-time faculty members can offer up-to-the-minute observation to students who will soon be competing for jobs in the market place." David A. Harris, "From the President's Perspective: Part-Time Faculty in the 1980's," New Directions for Community Colleges, 1980, p. 13.

[5] N. Carol Eliason, "Part-Time Faculty: A National Perspective," New Directions For Community Colleges, 1980, p. 1.

[6] 8 NYCRR 52.2 (2).

[7] "Policies and Procedures," Commission on Higher Education Middle States Association of Colleges and Schools, 1978, p. 106.

[8] "It is inevitable that the collective bargaining unit, representing full-time faculty interests, will attempt to limit the employment of part-timers. A few contracts, about 10 percent, primarily in large institutions, limit part-time employment to 20 percent of the teaching hours. One can expect this issue to magnify in the near future as faculty bargaining representatives increasingly attempt to reduce the employment of part-timers and as administrations try to rely more and more upon them." Irvin Sobel, "The College Professor as Employee: Workload and Productivity - 1", The Uniqueness of Collective Bargaining in Higher Education, April, 1978, p. 40.

8. THE USE AND ABUSE OF PART-TIMERS - II

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The Nature of The Problem

Attempting to assess the reality of the "use and abuse" of part-time faculty in institutions of higher education and their role in and impact on the collective bargaining process is a formidable task indeed.

In the first place, the serious, scholarly literature dealing with adjunct or casual faculty leaves a great deal to be desired. Furthermore, the reactions of practically everyone involved in the practice of part-time instruction, as administrators charged with the operation of programs with significant numbers of adjuncts, as union officials responsible for the representation of both part-time and full-time faculty, or people who serve in an adjunct capacity, tend to be subjective in the extreme when they evaluate the experience.

Even the dimensions of what amounts to an army of collateral instructors is difficult to measure. However, the National Center for Educational Statistics does indicate that more than 32% of the American professoriate, well over 215,000 persons, are part-time employees. There are institutions which have seven part-time instructors for each full-time faculty member. There are even examples of colleges which operate entirely with adjunct faculty members, with no regular staff at all.

My own institution, from which I am on leave, provides a classic example of the problem. All of us in SUNY talk about a 16-1/2 - 17,000 FTE person unit. But in the last calendar year, 20,040 persons paid dues or fees to UUP, the Union which I represent. The recent reclassification upwards of 700 part-time faculty and staff out of our unit is a bellweather for the future. It is conceivable that more and more, regularly, albeit part-time people will be severed from the unit - redefined as "not employees under the Taylor Law definition" and not entitled to access to a collective bargaining process or protection, until such people replace full-time faculty and, in the extreme situation, the entire University is floated on so-called "casuals." The end result could be the effective destruction of collective bargaining in the largest public University in the nation and the possible breakdown of any standards of quality or excellence.

Obviously, the availability of such a large un- or under-organized work force is not an insignificant influence in the "Groves of Academe." It is bound to have a very dramatic impact, however indirect or subliminal it may be at present, on the collective bargaining process. There is real potential for the erosion of collective bargaining and de facto union busting, if part-time people can be used to replace regular full-time personnel, particularly if management determines they

are not legitimate parties to a contract.

While attrition is certainly a more humane way to handle the perceived need to shrink faculties, the growing tendency to plug gaps with adjuncts will have a disruptive effect on institutional life in general, particularly if their basic employment rights are not protected by collective bargaining and Agreements hammered out at the table.

I think that at this point it is important to state that I am completely convinced that the best ally American higher education has is a good contract protecting the interests of faculty and staff, whether they be full or part-time, a management committed to proper enforcement, and a militant and effective union monitoring the implementation of that contract. Where this condition exists, the values most highly prized by those of us, on both sides of the table, who have devoted our lives to higher education, will be most effectively served and preserved.

For real or imagined reasons, colleges and universities face severe budget constraints. The halcyon days of the Sixties are over. Pressures are building for greater efficiency in the academy, for the "speed-up," for cost effectiveness and for better management. All of us are expected to make significant contributions to the accomplishment of these objectives and the expansion of the use of "casuals" is one way in which the traditional academic is expected to contribute.

In preparation for this presentation, I interviewed management, union and adjunct personnel in three states (Connecticut, Massachusetts, and New York) and the District of Columbia. What I learned from this effort, coupled with reflections on my own long association with the Buffalo Extension of the New York State School of Industrial and Labor Relations as an adjunct, has moved me into a new appreciation of the values of collective bargaining in higher education for both faculty and administration, particularly when it comes to this problem of adjuncts and casuals.

It goes without saying that part-time faculty have a legitimate place in the University. Many vital and extremely valuable programs could not exist without the part-time faculty. In some cases, they are the faculty. The Cornell I.L.R. Extension program through New York State, the SUNY's Farmingdale Ag & Tech Evening Division and similar evening divisions at most of our community colleges throughout the nation are examples of that reality.

Such programs attract large numbers of adult students--mature working people who have come late to formal education and are looking for something other than the traditional in higher education. Many of them are not degree-oriented, but are seeking rather specialized courses which will yield almost immediate and very pragmatic rewards in their lives or on the job. Practitioners, actively engaged in the fields to which these students are attracted, are able to offer state-of-the-art experience and information which is best

able to meet the needs of such students. Furthermore, properly integrated (and that is an important caveat) into the college or university life, these unique characteristics of the part-time staff can have a very positive and stimulating impact on the regular faculty.

Coming in from the outside, or the "real world" as it were, they can provide needed intellectual stimulus. Their experiences are quite different from the traditional academic and, hence, their perspectives are often different. Interacting with both students and regular faculty members can provide an often badly-needed leaven that is productive of a more exciting learning environment and a catalyst to creativity. Indeed, at a time of severe budget constraints which are forcing a "steady state" or actual retrenchment of full-time, tenured staff, the hiring of part-time personnel, it is contended, is the only way in which new blood can be brought, even temporarily, into a given department.

Instructional Levels

It is often argued that since part-time people teach only the most basic courses, the quality of instruction is adversely affected, but this is not necessarily the case. The so-called "bread and butter" courses, taught two to four times a year for ten or fifteen years by a regular staff person, can have a deadening impact on students and staff alike. The involvement of large numbers of adjunct personnel in these courses can free the full-time faculty to concentrate on the more advanced courses in the curriculum, the more specialized work which requires greater sophistication and expertise. Another dimension of this not insignificant potential contribution of the part-time staff is the freedom it can give the regular academics to pursue scholarship, research and publication of their own and to mentor, on a one-to-one basis, the work of their graduate students.

Charges to the contrary notwithstanding, quite often the part-time faculty member has an intrinsic motivation for becoming invovled in college level teaching which goes beyond mere money. Certainly, it was not the $650 and $700 a course which I earned at the Buffalo Extension which attracted me to work there for six years. Teaching classes of adult students exclusively was a very different experience from my work in the traditional classroom, which I found to be extremely exciting. I gained new perspectives on traditional material, making that job a stimulating learning experience for me, as well as a novel teaching opportunity. I am confident that my regular students benefited very positively from my involvement in the extension environment. I know that I did.

From the point of view of both the institution and its full-time faculty, there is one other positive contribution which the employment of a complement of adjuncts often can make. Hiring part-time staff enables the institution to respond quickly and positively to substantial shifts in enrollment from year to year or even from semester to semester. It also allows a rapid response to the often highly volatile changes in high demand or "fad" areas of study. Keeping the tenured faculty below full strength permits the

college or university to hire temporary faculty members to teach extra sections when demand is high. Then, when enrollment and interest in an area decline, there is no serious retrenchment of long-term, full-time staff. But only when the part-time staff is welcomed into the Union and the University and is vigorously negotiated for and protected by the negotiated contract, will these potential benefits be realized.

Once one has done an inventory of the possible contributions which might accrue to the academic world from the employment of an army of "adjuncts" or "casuals," it is necessary to look at the potential [illegible]. This exercise highlights both the problem and the challenge for collective bargaining for adjuncts. The practice of using large numbers of casuals is subject to very serious abuse, and to the best of my ability to assess the reality of the present situation, the golden picture of the positive contributions of part-time faculty is no more than a mirage, designed to excuse or rationalize a grim picture of exploitation, buck-passing and bad management.

Webster's Seventh New Collegiate defines an "adjunct" as "something joined or added to another thing but not essentially a part of it." Used as an adjective, "adjunct" means "attached in a subordinate or temporary capacity to a staff." A "casual" is defined, when used as an adjective, as "subject to, resulting from or occuring by change; occurring without regularity; feeling or showing little concern, nonchalant." Synonyms for "casual" are "accidental" and "random."

My investigation of the part-time situation as it currently exists, at least in Northeastern higher education, as unscientific as it admittedly is, indicates that these words are well chosen to describe the practice. They also give the lie to those who argue that the system is more positive than negative, and that the benefits outweigh the liabilities. It is my conviction that if the failure of either Union or management to adequately address the needs of the part-time staff in the collective bargaining process is continued, this reality of the present scene will continue and degenerate still further.

First and foremost, part-time faculty are not essentially integrated into any regular faculty that I could find. The Policies of the Board of Trustees of the State University of New York, which is typical, makes this isolation of the adjunct faculty very clear. These Policies define the composition of the faculty of each college as "the Chancellor, the chief administrative officer and other members of the voting faculty of the college, or other members of the academic staff of the college, and such nonvoting administrative officers and professional staff as may be designated by the faculty bylaws of the college." The "voting faculty" is limited to the above-named administrators and "members of the academic staff of the college having academic rank and term or continuing appointments." Part-time personnel are nowhere alluded to. Clearly, they are set apart and excluded from regular participation in the life of the institution because they are denied genuine faculty status.

Generally speaking, adjuncts are not represented on faculty senates or governing bodies, and while they often pay dues, are not effectively represented in unions. They cannot contribute significantly to curriculum development. Often, they cannot even select the reading lists for their courses. More often than not, the part-time faculty member is not invited to department meetings and even when the invitation is extended, is effectively barred from attending by the obligation of the primary employment. The very real second-class nature of the part-time appointment inhibits the development of genuine espirt-de-corps and creative interaction between and among faculty. What positive contributions the adjunct or casual can make in these vital areas of academic life are, in fact, "accidental," "random," or very much the result of "chance," if they are real to any substantial degree.

Subordinate Status

The subordinate status of part-timers, which has been sanctioned by decades of practice, has relegated them to a ghetto-like existence. Few contracts effectively address the needs of adjuncts; all too often the sanctioned status relegates the necessary protections of part-timers to footnotes to the contract by negotiators on both sides of the table, with the consequence that the dangers and problems inherent in the existence of this large pool are perpetuated and never effectively addressed.

Prevailing practice does not usually give part-time faculty regular offices with the result that the best-intentioned find themselves unable to participate meaningfully in student advisement or even to respond effectively to remedial needs on a one-to-one basis. Conferences in the Student Union over blue books or classroom problems are no substitute for the more formal office session before or after class. In such circumstances, the student is deprived of an important dimension of the learning situation. Quality and standards are thus compromised.

The hiring of part-time personnel itself is often the result of accident or chance. When asked to characterize the hiring practices at his institution, one Dean charged with a very large part-time operation, termed them "helter skelter." Pressed, he indicated that there was nothing that he could do about the practice because he never knew from one semester to the next how many adjuncts he would need, or even where they might be required. Consequently, hiring had to be last-minute, ad hoc and even "serendipitous." "A faculty member had a wife . . . a friend . . . we owed it to a local school superintendent . . . city councilman . . . if we were lucky, word of mouth gave us a pool of reasonably qualified high school teachers seeking to "moonlight" for the extra money or even the prestige . . . After all, the sections have to be covered."

If it is true that the students attracted to large evening divisions are often more mature and sophisticated than their traditional counterparts, such hiring practices seem to be a very strange way of responding to their special needs and legitimate demands and expectations. Where such practices

prevail, it is difficult, if not impossible, to maintain quality control or any approximate standards of excellence. Excellence, when it is found in such circumstances, and it often is, is still the result of chance and not of planning or control. The casual way in which part-time faculty are hired, effectively bars any systematic program of accountability, and in the long run, undermines any gains in stability, job security and, of course, quality of offerings.

Who is hired and why they seek such employment gets right to the heart of one of the fundamental problems inherent in maintaining quality and standards in these circumstances. At the same time, it creates new problems for both union and management in the effort to rationalize the system through collective bargaining.

Many of the finest examples of excellent part-time teachers I found were academic wives. They were often highly accomplished professionals in their own right, but their geographic mobility was inhibited because they were tied by familial obligations to the location of their husbands' appointments. Few of these women found permanent, full-time positions. Even when they are employed steadily in a part-time capacity, they were often mercilessly exploited, which is an intolerable situation from many points of view. Many of these women were willing to live with this exploitation because they desperately needed an academic base, if they were to continue to function professionally. (What scholarly journal will take seriously the work of Mrs. Harry Smith?)

Two examples which I turned up in my investigation of this problem illustrate the case in point. While they may be particular, they are by no means isolated or unique.

There is a nationally-known scholar in the Boston area who finds herself unable to leave the region for better employment because of her personal situation. After teaching for seven years as a half-time faculty member, she sought promotion and tenure, only to be informed by her Dean that she might be considered after fourteen years because, "after all, she was half time." The second academic wife, with Ph.D. and publications, taught for two years as a full-time temporary, at a four-year college, earning $16,000 plus regular benefits - a proven quantity. For the coming year she has been offered a half-time load at $1135 per course. This practice can only be deplored as cruel exploitation, and it does not take much imagination to see how such practices can undermine collective bargaining gains, particularly wages, hours and job security.

Not all of the part-time people drawn from such a pool are as capable or dedicated as the two just cited. There are many who take on the part-time assignment for social or purely monetary reasons. At one community college there are so many of these women that they are characterized as the "color TV set." Their job means little more than the addition of a luxury to the family's home that they could not otherwise afford. Where such a "set" exists, the maintenance of standards can be highly problematic, and the serious commitment to both the institution and its bargaining agent, is highly

questionable.

Affirmative Action Issues

There is another dimension to the practice of exploiting an available pool of underemployed women which is deeply disturbing to those of us concerned with real application of Affirmative Action.

In circumstances where there are five part-time instructors for every regular faculty member, where there are enough student credit-hours being generated to justify hiring more full-time faculty, and particularly where the courses in question are essential to the discipline, are we not inhibiting opportunity for equal pay for equal work, as well as eroding the regular unit? Where these five part-time people are underpaid women, are we not sanctioning the barring of employment of one or more qualified women or minorities in a full-time position and for a living wage with the consequent loss of creativity, scholarship and standards?

Part-time faculty interviewed in this study almost uniformly complained of economic exploitation and cavalier treatment. The nonchalant hiring practice of one Connecticut Community college is illustrative of the cavalier attitudes referred to. Long-term part-time employees were told to expect employment in their regular cycle, unless called and informed otherwise. However, most found that if they wanted to be able to plan both their teaching or their lives generally, they had better call in during the last week of August, because all too often, administration neglected to inform them that their services were not needed that year. And as they approached seniority, they knew what the results of that call would be.

In most places, the adjunct, no matter how highly-qualified or committed to the program, is "cheap at twice the price." He or she is usually paid on an hourly basis or a flat sum for each course taught. The salary is minimal and rarely, if prorated to a full-time basis, would it approach a living wage. There are examples of the "academic gypsies" in the D.C. Metropolitan area who migrate around the community college circuit, teaching five and six courses for $10,000-$12,000 per year. Most "adjuncts" interviewed had received no increase in their pay rates in six years. Hopefully, the recent contract settlement for the Metropolitan New York adjuncts at the I.L.R. school will prove to be a break-through of national significance. Few had regular contracts or salary schedules. Where such schedules did exist, they were often the victims of last-minute course elimination as they approached the top of the schedule and were therefore less cost-effective. Most receive no fringe benefits such as retirement and pension contributions, health and life insurance, and sometimes not even contributions to Social Security. Such practices are frankly obscene, and cry out for collective bargaining redress. Where else is it going to come from?

Part-time status can also be used as a way of avoiding tenure or continuing appointment. I found one minority lady,

brilliant at her job of teaching remedial English, whose appointment was reduced to 90% so that she would not have to face a tenure review which might have adverse results since she did not have her terminal degree. (While one can sympathize in this particular case, as a precedent, it is not something that can be tolerated.)

The growing exploitation of part-time personnel has other consequences which are rarely talked about.

Large numbers of part-time people generate a mountain of paper work, diverting managerial time from more important tasks, not the least of which is long-term planning. The vaunted flexibility that the large part-time pool permits, actually contributes to the perpetuation of the worst aspects of the situation. It allows administration to evade serious decision-making by facilitating the plugging of holes in the curriculum. The hard questions of reallocation of resources and long-term planning are thus swept under the rug.

Even in the rare situation when adjuncts are integrated into a department, the impact can be negative, undermining the stability of academia. Part-time personnel often have no real stake in any part of the program, except the desire to keep the part-time program going. They therefore contribute little to the intellectual life of their department. The ferment they create is the ferment for the status quo and not the ferment of the intellectual life of the academic community.

Only when the ad hoc exploitation of adjuncts is checked -- and the only way this can be done is through the collective bargaining process -- and colleges and universities develop a rational philosophy for their involvement in the life of the academy, will we be able to do the long-term planning that the coming realities of the economy and demography of the nation require, as we approach the twenty-first century. Both union and administration, it seems to me, have been remiss in not appreciating the magnitude of this problem, and for permitting the reactive rather than the planned use of the part-time faculty, with the proper protections of their status.

In conclusion, let me suggest that there are potential advantages to American Higher Education in the use of the adjunct. The potential is there for the enrichment of our offerings, for badly needed flexibility in substance and number, for increased heterogeneity, improved instruction in the state-of-the-art, particularly in science and technology.

However, the present practice virtually precludes the translation of that potential into reality. It is too irrational and reactive. Only when careful thought is given to the role that a given institution wants and needs the adjunct to play in its intellectual life and that role is regularized with proper consideration of and guarantees for the basic rights of the human beings called upon to fulfill that role, will American Higher Education truly benefit from the opportunity presented by the adjunct. The latter, ladies and gentlemen, is what contracts are all about.

9. MANAGERIAL DISCRETION, FINANCIAL EXIGENCY AND REDUCTION IN FORCE: THE EXPERIENCE IN NEW JERSEY'S PUBLIC, TWO-YEAR COLLEGES

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Introduction

One of the crucial issues for this higher education era is the question of when and how it is appropriate to layoff employees who are tenured or on multi-year contracts. The combined impact of declining enrollments and decreasing budgets has made it necessary for many institutions to reduce the size of their faculties. In private industry labor relations, it is a well-established principle that an employer has the right to layoff employees for economic reasons, subject to any layoff and recall procedures which it may have negotiated with its unions. In higher education, however, it has been traditional to provide special protections for the tenure system which has evolved to protect academic freedom so that employers find their activities and thus their flexibility limited when it comes to laying off faculty. The AAUP standards and procedures for declaring and implementing a financial exigency are an example of efforts to protect the tenure system. The AAUP has defined financial exigency as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."[1]

A series of court cases in recent years has begun to develop an understanding of the employer's discretion in laying off either tenured faculty or faculty who are in the middle of multiple-year appointments. One thing that can be concluded from the cases is that the AAUP's "survival" standard has not received much support from the courts. Instead, the courts have adopted an operating fund rather than a capital assets test.[2] In addition the courts constrained their own discretion in making a determination of whether or not financial exigency is bona fide. In AAUP v. Bloomfield the appellate court established "that the trustees' decision to sell or retain a parcel of land was not a proper subject for judicial review." In order to define an institution's situation as one of financial exigency, there must be evidence of deficit operation over a period of years and an indication that the deficit will continue into the next year. Additionally, freezing of salaries (faculty only in some cases), and cuts in nonsalary areas and nonfaculty positions are usually required as indication of a bona fide exigency situation.

The question of the appropriate unit for layoffs is raised in Scheuer v. Creighton University.[3] Can the administration of an institution make a determination that one subunit of the institution faces financial exigency or does the definition have to apply to the institution as a whole. In the above

cited case, as well as in Johnson v. Board of Regents of University of Wisconsin System,[4] the courts ruled that the administration has the discretion to apply financial exigency to subunits of the institution while the institution as a whole may not be in the same situation.

Another series of questions concerns the way the courts have constrained the discretion of administrators in making the connection between a bona fide situation of financial emergency and appropriate measures for dealing with this situation. The courts have clearly indicated that academic planning has to take place to ensure survival of the institution in the current financial situation. Given an "objective" procedure for determining the essential program of the institution and the positions necessary to maintain that program, reduction in force of tenured faculty may take place. Another requirement placed upon administrators in actually terminating a tenured faculty member is the consideration of alternative opportunities in the institution for which the individual is qualified. Not included in this, however, is the requirement that the faculty member who has been laid off be offered training and time to qualify for another position (Krotkoff v. Goucher College).[5]

In Johnson v. Board of Regents of the University of Wisconsin System, the court defined the minimum constraints within which administrative decisions can be made.

> "furnishing each plaintiff (terminated faculty member) with a reasonably adequate written statement for the initial decision to layoff;
>
> furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;
>
> making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and
>
> providing each plaintiff the opportunity to respond."[6]

The court went on to conclude that where these practices and procedures were in place, the Fourteenth Amendment did not give the plaintiffs the right to "persuade the decision-makers that other departments, areas, or campuses should have borne a heavier fiscal sacrifice," nor were those laid off "entitled to adversary proceedings similar to a court trial or a workman's compensation hearing . . . ."

The final requirement placed on management decision-making which serves as an indicator of the bona fide connection between financial exigency and the termination of positions is that the institution will not replace terminated faculty

without first giving those terminated an opportunity to be rehired and a reasonable period of time in which to accept or reject this opportunity.[7]

The developing New Jersey experience in the public two-year colleges reinforces and extends these national developments in respect to managerial discretion in implementing layoffs.

The New Jersey Experience

The understanding of the New Jersey Community College experience requires an analysis of the sources of policy regarding reduction in force. One definite conclusion which can be drawn is that the policies are primarily derived from statute or administrative regulations rather than collective bargaining agreements. The New Jersey courts have drawn the boundary rather tightly around what unions can negotiate. Indeed, of the states permitting public sector negotiations, New Jersey probably has the most restricted scope of negotiations. Basically, the New Jersey Supreme Court has decided that even if an issue is a negotiable term and condition of employment, negotiations are not permitted if statutes or regulations preempt the area.[8] Reduction in force is an area which is preempted by statutes and regulations, and therefore not negotiable. Furthermore, a subsequent Superior Court award held that there was also no obligation to bargain on the impact of a reduction in force decision.[9] Because of these court decisions the role of bargaining agents in reduction in force situations consists of representing affected members in administrative and court proceedings.

New Jersey Statutes and Regulations Dealing with Reduction in Force

The relevant New Jersey tenure and RIF policies for two-year college faculty have to be gleaned from a reading of several statutes and regulations and an attorney general's opinion.

The basic statute which authorized the two-year colleges in New Jersey was passed in 1962.[10] Tenure and RIF policies were not specified in this statute, but the statute did contain the following provision:

> "The teaching staff employees and administrative officers other than the president of the county college are hereby to possess all the rights and privileges of teachers employed by local boards of education . . . ."[11]

If we refer to the statute providing for teachers rights and privileges we find that teachers are extended tenure after three consecutive years of employment.[12] The statute also provided for due process protections against dismissal or reduction in salary for inefficiency, incapacity, conduct

unbecoming a teacher or other just cause, and it permitted a board to carry out a reduction in force where the reduction was "due to a natural diminution of the number of students or pupils in the institution or institutions."[13] Length of service is the only legislatively prescribed criterion for determining the order of release of tenured faculty. Teachers who have been dismissed remain indefinitely on "a preferred eligible list" according to years of service to be rehired should positions for which they are qualified become available.

A subsequent tenure statute covering the state colleges and two-year colleges was passed in 1972 providing, in part, for tenure after five consecutive academic years, if an individual was reappointed for a sixth year.[14] Another legal link was provided by the Attorney General in an opinion requested by the Chancellor of the state system of higher education in 1975.[15] The Attorney General, recognizing that the statute[16] dealing with teacher layoffs was silent on the matter of reduction of staff for financial reasons since it specifically dealt only with enrollment declines, analyzed New Jersey education court cases and concluded that there was inherent power in educational authorities to institute a reduction in the number of teachers for reasons of economy. It should be noted, of course, that for institutions of higher education the two bases for RIF are related, that is, a decline in enrollment produces an economic effect due to a decrease in tuition income.

Although the statute dealing with RIFs specifically speaks only to the use of seniority for implementing layoffs, the Attorney General also read into the statute a requirement that qualifications may be considered in filling remaining position. The following example was offered:

> . . .if it was determined that there be a reduction in the number of French professors, the nontenured French professor must be released first, followed by the least senior tenured professors. A tenured French professor may be released even though a nontenured German professor remains on the staff. However, if the tenured French professor is also qualified to teach German, he has preference over the nontenured German professor. In every instance, the determination of faculty members' qualifications to fill an existing position is within the sound discretion of the college.

In sum, while only seniority may be used for a reduction in force, other criteria such as academic rank, degrees earned and actual performance may be used "insofar as these criteria reflect on the qualifications of a faculty member to fill the remaining positions." Until decided otherwise by the courts, the opinion of the Attorney General represents the New Jersey law on the subject.

Case Analysis

There has been three cases to which the above body of law

has been applied: Atlantic Community College,[17] Gloucester County College[18] and Cumberland County College.[19] None of the cases as yet has involved a court decision. All have been decided by administrative law judges whose decisions are subject to the review of the New Jersey Chancellor of Higher Education. In Atlantic Community College,[20] the Chancellor essentially accepted the judge's decision. In Gloucester County College,[21] he remanded the matter to the administrative law judge for further testimony on whether or not a financial exigency existed. As of the writing of this paper, the Chancellor's decision in the Cumberland County[22] case, decided in March 1982, has not appeared. He has 45 days to issue a decision.

Gloucester County College

The petitioner was terminated on June 30, 1979, because the College asserted that there had been a decline in enrollment and a financial exigency, although she was not told that these were the reasons when she terminated. The petitioner was a tenured assistant professor of health, physical education and recreation. Two others from her unit were also terminated.

The enrollment in her area had dropped from 460 students in the Spring of 1978 to 386 students in the Spring of 1979, in part, because of a prior board decision which reduced from two to one the number of credits from health, physical education and recreation required for graduation. Additionally, the County governing body had refused to increase the College's budget over the previous year. The College had requested just over $5 million, while only $4.5 million was approved. The instructional account of the budget had been increased, although the College argued that increased salaries and other costs for the remaining staff were the cause.

The petitioner also tried to argue that she was qualified to be a guidance counselor--one guidance slot was held by a non-tenured counselor with a Master's degree in guidance. She had 12 credits in guidance; 30 were recommended by state guidelines. She had performed guidance duties when we had been a high school teacher. She did not respond to a memorandum offering job-seeking assistance where such possibilities might have been discussed. The College indicated that it had reviewed her qualifications and found her training and experience did not minimally qualify her for the job.

The administrative law judge found that there had been a financial exigency and that therefore the College had acted properly. He also found that she was not minimally qualified to replace the nontenured guidance person and that a four-month, three-week termination notice was adequate. He did direct the College to determine if she was qualified for nontenured adjunct positions since the record did not indicate that she was accorded this opportunity.

The Chancellor of Higher Education remanded the case to the administrative law judge for a further consideration of whether a financial exigency existed. He did not feel that an

exigency was established by the failure of the College to get the budget it requested. The Chancellor also pointed to the fact that in the year following the layoff there was still a liquid reserve remaining of $817,000 after a $180,000 deficit. He asked the question that since the reserve had been used to cover the previous operating deficits, why was it not used this time to prevent a layoff of a tenured person. He also criticized the failure of the College to discuss other alternatives for meeting any budget shortfall. A subsequent settlement worked out by the College with the affected faculty member closes the case and renders the issue of financial exigency moot.

The Chancellor dismissed the enrollment-decline argument on the basis that the petitioner had not been told at the time of termination that this was the reason. He concluded that:

> The determination of a fiscal exigency is a conclusion that should be reached by a Board only after consideration of all the alternatives that could reasonably be considered within the time available to the Board to reach a decision. Such a determination, if permitted to be made too easily, could make a mockery of the tenure rights conferred to protect academic freedom.

An interesting aspect of this case is that the Chancellor has ruled, and unless it is overruled in some subsequent court procedure, it stands that the statutory right to remove faculty due to an enrollment decline may not be exercised nor asserted as an alternative ground for dismissal if the employee was not notified of this reason at the time of termination.

Atlantic Community College

In this case, eleven tenured faculty members and one administrator were laid off because of a college-declared financial exigency. The petitioners argued that there was neither a natural diminuation in enrollment nor a financial exigency. They also argued that the faculty's qualifications were not considered for other positions. The record showed that several disciplines were over-staffed and that in earlier years the College had been reducing staff by attrition due to drops in enrollment. However, the administrative law judge agreed with the petitioners that the record did not support a claim of financial exigency, which he declared it was the burden of the College to prove. Basically, he argued that the College had not sufficiently considered other alternatives for saving money. He pointed out that despite a loss in the College's operating fund, the surplus funds were sufficient to have met all the salary obligations to the terminated faculty. Freezing administrative and faculty salaries were other alternatives noted by the judge which were not employed by the College.

The judge also concluded that the RIF procedures were arbitrary in that the College relied strictly on the discipline in which each faculty member was assigned. Using the Attorney

General's decision he felt that their qualifications for other positions should have been considered, particularly since, in addition to regular faculty overloading, 100 adjunct sections were taught during the year in question. In fact, several faculty members were rehired as adjuncts, some for courses for which they previously were deemed qualified to teach. In one extreme case, a laid-off faculty member taught the equivalent of a full-time load at part-time salary.

He ordered all the faculty reinstated with back pay. Then, recognizing that enrollment declines were relevant, he stated,

> It may turn out that not every one of the petitioners is entitled to permanent reinstatement, however, this can be determined only after the qualifications of each are examined and compared with those who were retained to teach the same or similar courses earlier taught by these petitioners.

The Chancellor did not accept all of the administrative law judge's recommendations but substantially approved. He concurred in the lack of extreme fiscal urgency which could abrogate rights of tenured faculty members. Because there is a linkage between fiscal exigency and declining enrollment, layoffs should have followed the statutory process for declining enrollments. The Chancellor directed the College to reconsider its actions in view of the declining enrollment. The most important guide enunciated in the decision dealt with faculty qualifications. Faculty are hired, evaluated and tenured in a particular discipline. In a layoff they are to be evaluated for employment consideration in such other areas where they may have expertise according to the standards for appointments in the "other disciplines."

In a companion decision[23] on a motion to reconsider, the Chancellor laid out guidelines for adjunct faculty in a layoff situation. Some of the laid-off tenured faculty were qualified to teach in areas where others were either hired as adjuncts or were full time faculty teaching an overload. The practice was disapproved unless restricted to situations where there is an insufficient teaching load for a full-time faculty member or where the laid-off faculty members have insufficient expertise to instruct. But if the courses taught by adjuncts on overload add up to a full load then declining enrollment may not motivate the layoff. In a true fiscal exigency the situation may be otherwise. The door was opened for explication but the Chancellor prudently stopped at this threshold.

Cumberland County College

The Cumberland case derived from the layoff of one faculty member and the reduction to part-time status for another for the 1980-81 academic year. An enrollment decline in foreign languages was the reason stated for the actions. One faculty member taught Spanish and Italian and the other taught Spanish. The College also stated that the terminated faculty member had a "demonstrated inability to teach in other areas."

It was on the latter basis that the College's decision was challenged--the petitioner contended that they were "qualified, ready, willing and able" to teach other courses.

The terminated faculty member was qualified by training to teach only Spanish and Italian, but he had taught at the College a number of other language courses, for example, English Composition, English as a Second Language and English Fundamentals. However, it was established that he had been offered these courses to determine if he was qualified to teach them since a full teaching program in his area was no longer possible due to declining enrollment. It was also established that his performance in the other courses had been inadequate--his salary increment was withheld one year, he received poor written evaluations from supervisors, and on one occasion he had refused to mark themes and return them. The administrative law judge felt that the evidence overwhelmingly supported the College's determination that he was not qualified to teach other courses.

The issue in respect to the reduction from full-time to part-time status of the other petitioner was a legal one, that is, do the New Jersey tenure statutes permit such action. The judge concluded that relevant case law permitted an employer to not only terminate employees from full-time status. The issue of qualifications was not raised for the second individual.

Summary and Conclusions

What can be gleaned from the New Jersey experience in respect to managerial authority to implement layoffs? First, it must be noted that the relevant policy for faculty layoffs is derived from statutes or interpretations thereof. These statutes have been interpreted as permitting layoffs of tenured faculty for either enrollment declines or budgetary problems. The collective bargaining process, for reasons previously noted, does not play a role through negotiations in setting layoff policy. One effect of this development is that the faculty and its unions can be expected to use other governance mechanisms to influence reduction in force policies.

In terms of the developing meaning of financial exigency, since no employer has as yet successfully established its required burden of proof, the meaning of financial exigency is still evolving. Several things, however, seem clear at this point from the three cases. First, employers must establish that all possible economic alternatives have been explored before reaching a conclusion that the layoff of tenured faculty is required. The existence of budget surpluses and the continuation of normal faculty and administrative salary increases are some of the things which have been pinpointed as areas which tend to undermine claims of financial exigency. The continued employment of part-time faculty in courses for which it is possible to use full-time faculty also undermines a claim of financial exigency. Give the large number of part-time faculty employed in two-year colleges, this is likely to be a particular concern. The failure of a governing body to grant an institution's budget also is not sufficient proof of an exigency, according to the Chancellor.

A review of the cases produces a feeling that public two-year institutions in New Jersey may have peculiar problems in establishing financial exigency. Unlike private institutions, the well may not necessarily be dry due to statutory procedures provided to respond to financial emergencies occurring after the budget was prepared. Each county college has a statutory board of school estimate comprised of members of the county governing body (called the board of chosen freeholders) and the college's board of trustees. The board approves the annual budget after public hearings and also responds to emergencies during the budget year. In the latter instance, the board without a public hearing, determines the additional funds needed and the county governing body must provide them. As long as the prospect for additional funds is available, proving financial exigency is difficult. It would seem that focusing on necessary educational decisions deriving from declining enrollment would be the more productive approach.

In implementing a layoff of tenured faculty, it is also clear that targeted faculty must be given every opportunity to establish qualifications for other positions. In other words, the scope of one's tenure is not necessarily limited to a particular discipline or department. If an employer can prove that job performance is not adequate for teaching other courses, then the person need not be retained. But the burden appears to be on the employer to establish this case through having systematically evaluated and recognized non-performance. A try-out period is a policy which would appear to be a direction that administrative law judges would view in favorable terms. In terms of other qualifications, the boundaries are still evolving, but the administrative law judges have used statements of licensing and degree requirements to set minimum standards for relevant educations and experience. The Chancellor concluded that the faculty must meet the standards for appointment in the other disciplines for which they are being considered.

In sum, in the context of comprehensive statutory procedures for tenure, the experience in New Jersey's public two-year colleges reinforces prior court decisions which carefully prescribe management behavior in respect to laying off tenured faculty. It is clear that higher education administrators must attend to careful academic and financial planning since the courts will not countenance arbitrary and capricious behavior when it comes to laying off faculty with tenured or multi-year appointments.

FOOTNOTES

[1]American Association of University Professors, AAUP Policy Document and Reports, (Washington, D.C.: American Association of University Professors, 1977), p. 17.

[2]AAUP v. Bloomfield College, 129 N.J. Super. 249 (Ch. Div. 1975) aff'd in part 136 N.J. Super. 442 (App. Div. 1975), and Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978).

[3]199 Neb. 618, 260 N.W.2d 595 (Sup. Ct. 1977).

[4]377 F. Supp. 277 (1974) affirmed 510 F.2d 975 (1975).

[5]585 F.2d 675 (1978).

[6]See Johnson v. Board of Regents of University of Wisconsin System, supra N.4.

[7]Browzin v. Catholic University of America, 527 F.2d 843 (1975).

[8]Ridgefield Park Education Association vs. Ridgefield Park Board of Education, 78 NJ 144 (1978); State vs. State Supervisory Employees Association, 78 NJ 54 (1978). In Ridgefield Park it was also decided that there is no permissive area of negotiation. Issues are either mandatory or negotiations are not permitted at all.

[9]Maywood Board of Education v. Maywood Education Association, 168 NJ Super. 45 (1979).

[10]R.S. 18A : 64A-1.

[11]R.S. 18A : 64-A-13.

[12]R.S. 18A : 60-1 et seq.

[13]R.S. 18A : 60-3.

[14]R.S. 18A : 60-6 et seq.

[15]Formal Opinion 1975-No. 18.

[16]R.S. 18A : 60-3.

[17]Duggan et al v. Board of Trustees of Atlantic Community

College, OAL Dkt. No. HED 4971-80 (Sept. 1981).

[18]Northey v. Gloucester County College, OAL Dkt. No. HED 2244-79 (July 1981).

[19]Bonadeo et al. v. Board of Trustees of the Cumberland County College, OAL Dkt. No. HED 5006-80 (March 1982).

[20]Duggan et al. v. Board of Trustees of Atlantic Community College, OAL Dkt. No. HED 4971-80 (Adopted in Part and Modified in Part, Chancellor Decision Nov. 1981).

[21]Northey v. Gloucester County College et al., OAL Dkt. No. HED 2244-79 (Rem and, Chancellor Decision Sept. 1981).

[22]19, Supra.

[23]Duggan et al. OAL Dkt. No. HED 4971-80 Motion for Reinstatement, (Chancellor Decision Jan. 1982).

10. ACADEMIC FREEDOM IN CANADA IN THE 1980's

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Introduction

The concept of academic freedom can, I think, be divided into three broad components: academic freedom for students; academic freedom for faculty and librarians; and academic freedom as it applies to universities as a whole.

Very little, to my knowledge, has been published about academic freedom of students and I do not propose to cover this subject in great detail in these remarks. It seems to me, however, that students are clearly entitled to freedom of expression about the content and appropriateness of courses and programs to which they are exposed. They are also as entitled as faculty members to express their views on public issues of the day and to comment on the administration, governance and policies of the universities with which they are associated. Their freedom to register for particular courses or programmes is, however, necessarily constrained by available places (in professional schools, for example), by prerequisites, and by ability.

The participation of students in the academic affairs of the Canadian universities developed rapidly in the 1960's and 1970's. They are now generally represented on departmental committees, on faculty councils and on university senates, although obviously not in proportion to their numbers. They are frequently involved in new faculty appointment recommendations. They are represented on course and curriculum committees and occasionally participate in tenure and promotion recommendations.

The difficult economic times have resulted in Canadian university student bodies which are much less activist in the 1980's than they were in the 1960's and 1970's. It seems likely, however, that student groups will soon seek to establish more precisely the limits of their entitlement to participate in the affairs of the university. This will inevitably modify the academic freedom of individual faculty members in ways that are not yet clear.

It is the freedom of individual faculty members and professional librarians which comes usually to mind when academic freedom is discussed. It is certainly this aspect which is of greatest concern to faculty associations and unions.

It is difficult, perhaps impossible, to discuss academic freedom without also referring to tenure. The one implies the other despite frequent, though usually strained, arguments that this is not necessarily so. Tenure is the employment status which ensures academic due process in the universities. Indeed it seems that the phrase "entitlement to academic due process" might often usefully be substituted for tenure. It might reduce the persistent, in Canada one might almost say willful, misunderstanding of the nature of tenure among some members of the media, the government and the public.

Tenure is, after all, an incident of employment which is not dissimilar to the employment relationship widely enjoyed by other members of the work force. It is no more absolute job security in the Canadian context than it is in most United States institutions. In the words of William van Alstyne, a former President of AAUP, "The essence of tenure is wholly in the complement of reliable procedural requirements it affords as protection against summary, unilateral, unexplained and unreviewable non-renewal."[1] The fact that "academic due process" protects "academic freedom" needs constant reinforcement as does the view that tenure is necessary not merely for the protection of the career integrity of university faculty members but for the common good of society. It is necessary so that society may be assured, in the phrase of Byse and Joughin, of the benefits of "honest judgements and independent criticism".[2]

The Canadian Model

You may find it interesting to learn that tenure (and academic freedom generally) are relatively new concepts in the Canadian universities. Tenure was unknown outside of a few of the older universities until the mid-1960's. At Toronto and McGill, where tenure appointments were possible, the precise protections in law which they bestowed were ill-defined. In

most other universities academic appointments were "at the pleasure of the Board of Governors" and were covered by the unsatisfactory common law "master/servant" relationship.

Professor Michiel Horn of York University has compiled a depressing record of the infringements of individual academic freedom as a result of pressure from inside and outside the universities during the period from the 1930's to the 1960's.[3] Such threats to individual academic freedom came often from politicians, business leaders and Boards of Governors. For a variety of reasons threats to individual academic freedom from these sources are now relatively unusual. It is a confident prediction, however, that as the economic climate worsens there will be conservative opposition to those traditions which are perceived to provide faculty members with unjustified protection from the unpleasant aspects of the real world in the 1980's.

As an example from this earlier period Professor Horn has cited the efforts in 1939 of Mitchell Hepburn, then Premier of the Province of Ontario, to persuade the University of Toronto to discipline a faculty member for making comments critical of Candian rearmament. Of even greater notoriety, was the case of Professor Frank Underhill also of the University of Toronto. Very early in the 1930's Professor Underhill had roused the ire of Prime Minister R.B. Bennett with charges that his government's policies were not effective in coping with the Depression. He defended himself by pointing out that public comment by faculty members on issues of the day was common in Britain and the United States. The University President responded that the practices in those universities could not be adduced as justification of what might be done at the University of Toronto.

Professor Underhill was in trouble again in the early war years for suggesting at the Couchiching Conference that Canada's future relations with Britain would weaken and those with the United States would become stronger. He was accused of calling the war effort into question and there were demands for his dismissal. A Committee of the Board of Governors tried to persuade him to resign and threatened to fire him if he did not. Professor Underhill kept his job but Professor Horn is skeptical about whether this was a victory for academic freedom in Canada. He points out: "Professors did not become noticeably more outspoken in the two decades following Underhill's well-publicized troubles in 1939-41. His difficulties in fact may have deterred others from claiming the full extent of academic freedom". This, among other incidents certainly delayed the day when Canadian academics felt able to make unrestrained comment freely on public issues.

In 1959 the infamous Crowe case at United College, now the University of Winnipeg in Manitoba, led directly to the establishment of the CAUT Academic Freedom and Tenure Committee and the formulation of the CAUT Policy Statement on Academic Appointments and Tenure. Professor Harry Crowe's private letter to a colleague criticizing the administration of the College and, by implication, the United Church of Canada which appointed the governing body, was intercepted (it was said to have been found in a corridor in the College building) and delivered to the Principal. Professor Crowe was dismissed for disloyalty and because his views on religion were incompatible

with the Church traditions of the College. Although subsequently reinstated, he ultimately resigned because the College refused to reappoint three colleagues who had resigned in sympathy.

The first CAUT committee of inquiry to investigate a grievance within a university found that the behaviour of the College administration and governing body was unacceptable. It found that the firing of Professor Crowe was "an unjustified and unwarranted invasion of the security of academic tenure" and that Professor Crowe was "not servile enough in thought and attitude to his administrative superiors". The report enunciated clearly the right of faculty members to criticize their universities and their entitlement to a fair hearing if they are threatened with discipline or dismissal for such behaviour. One member of that committee of inquiry was Bora Laskin, then a Professor of Law, later President of CAUT and now Chief Justice of Canada.

Until the advent of faculty collective bargaining, which provided legally binding procedures for the resolution of grievances, academic freedom was largely protected in the Canadian universities by the CAUT Academic Freedom and Tenure Committee. This Committee, the equivalent of Committee A in the AAUP, is the body which attempted, when local efforts proved unsuccessful, to resolve grievances by persuasion, cajolery and occasionally threats of censure.

Denials of Academic Freedom

In recent years two particularly serious denials of academic freedom have been investigated by that committee. When it was not possible to obtain a satisfactory remedy in either case, the administrations of the universities were placed under censure. I refer to cases at the University of Calgary in Alberta and at Memorial University of Newfoundland.

In the Calgary case the privilege of a faculty member who was a kidney transplant surgeon to practice at the community hospital near the University was withdrawn for reasons which appear to have been related to personality conflicts with colleagues. Shortly thereafter the University of Calgary declined to renew his appointment. The faculty member had been assured on joining the Faculty of Medicine that the limited term appointment which he, perhaps naively, accepted was pro forma only and that he should consider his appointment to be probationary. The hospital was subsequently found by the courts to have behaved improperly and the surgeon received an award in damages. The courts have been traditionally reluctant to order specific performance of contracts in such cases and he was not reinstated in his hospital privileges. CAUT took the view that the university had an obligation to provide the faculty member with a hearing before deciding not to renew the appointment at the university. Censure was imposed when the Board of Governors declined to do so. The unfair action of a related institution thus resulted in the termination of an appointment without due process. Academic freedom is not protected in institutions when appointments can be terminated in such arbitrary fashion. As a result of this case a proposed new guideline on appointments held jointly by a university and

a related institution will go before CAUT Council next month.

In the case at Memorial University of Newfoundland the appointment of a Professor in the School of Social Work was not renewed because of her Marxist/Leninist philosophy and because she was accused of having used the classroom to disseminate that philosophy. A public statement early in the case by the University administration on the reasons for the non-renewal had, moreover, suggested that the philosophy of the professor was inimical to the objectives of that school. A CAUT committee of inquiry found that the charges against the professor were unsubstantiated, that she had in fact alerted students to her political beliefs, and had made a serious effort to present a balanced political perspective. The committee concluded that her activities and actions were not unprofessional and that academic freedom had been denied. The President and Board of Regents were placed under censure in 1979.

Improvements in faculty handbooks and the advent of formal collective bargaining agreements in many Canadian universities has put in place more reliable procedures for dealing with such cases. The reactionary forces now being felt in North American society will probably precipitate more use of these procedures if not demands for their abolition.

Though the majority of Canadian faculty members are now covered by collective agreements and have at least the minimum protection prescribed by provincial labor relations acts, a substantial number still have individual contracts with their universities subject only to the terms and conditions of appointment in faculty handbooks. In the past the Canadian courts have taken the view that disputes arising out of such individual faculty appointments would be dealt with under common law. Though they would usually review actions for wrongful dismissal, for example, and decide whether there had been unfairness, they would usually award only compensation for lost income. Damages are, of course, an inadequate remedy when a new appointment elsewhere is difficult or impossible to obtain.

In some cases in the recent past the courts declined entirely to review the substance of cases involving faculty members. For example, in Vanek vs. University of Alberta,[4] the Supreme Court of Alberta decided in 1975 that since the faculty tenure committee was not a statutory body the Court would not review the decision to deny tenure to Professor Vanek. Vanek was sent instead to the Visitor, an archaic functionary, in this case the Lieutenant Governor of the Province, charged in the Universities Act with informally overseeing the affairs of the University. He secured Vanek's reinstatement but the office of Visitor was shortly thereafter abolished by amendments to the Alberta Universities Act.

Recently, the Canadian courts have been more inclined to see the authority for academic status decisions made outside the context of collective agreements as grounded in the provincial statutes which govern the universities and to view faculty members as "office holders". A number of court cases have clarified the nature of professional contracts and the standard of fairness which should apply when academic status

decisions are made. The procedural aspects of contract disputes (where there is no collective agreement) will be reviewed by the courts. Though they are reluctant to substitute a judgement on substantive matters for the university decision, a case may be returned to the university for reconsideration. Review by a reconstituted tribunal holds out the prospect of reinstatement. A recent Ontario Court of Appeal decision (Paine vs. University of Toronto)[5] is, however, ambiguous. Although the court endorsed the entitlement of faculty to seek public law remedies it indicated that the courts should intervene only when there has been a serious injustice. It felt there had been no such injustice in the Paine case. It thus reversed a lower court ruling that it was manifestly unfair for a member of a tenure committee to declare in advance of a hearing that the candidate was not qualified for tenure. In view of the consistently negative tenure recommendations made by several subsequent committees within the university, the Appeal Court declined to intervene, mainly because it considered that the Toronto academic community had agreed to these procedures. An application to appeal to the Supreme Court of Canada was rejected, ironically, by a tribunal headed by the Chief Justice. CAUT would, of course, prefer to see a lower threshold which would prompt the courts to intervene.

In two other recent cases (Kane vs. University of British Columbia and Ruiperez vs. Lakehead University)[6,7] the courts have found that universities must observe a high standard of fairness in making decisions affecting faculty members. In the former case the University Board of Governors was found by the Supreme Court of Canada to be at fault in allowing the University President, who had recommended Professor Kane's suspension, to remain in the Board room but asked Professor Kane to leave during the final stages of discussion leading to the decision. In the Ruiperez case the Board of Governors, which had the final authority to make the decision to deny tenure, had not afforded Professor Ruiperez an opportunity to appear before it before making the decision. This case is now on appeal.

Due Process Entitlements

These decisions strengthen the legal entitlement of faculty to due process in matters affecting their appointments and thus strengthen academic freedom. Professor David Mullan of the Faculty of Law of Queen's University in Kingston, Ontario, has suggested that in the Canadian context we may be seeing a narrowing of the distinction between available public and private law remedies:

> Finally, as far as reinstatement is concerned, the less than automatic availability of reinstatement for wrongful removal in statutorily-regulated employment situations and some movement towards specific performance in personal service contract situations have led to a significant narrowing of the gap between public and private law. This narrowing has also been contributed to greatly in a practical sense by the effective stipulation of specific performance as a potential remedy from arbitrators and internal appeal

bodies at both collectively organized and non-organized universities.[8]

The ability of a university either under common law or under a collective agreement to terminate the appointments of tenured and untenured faculty members for "cause" has raised a question as to whether financial exigency or program redundancy can be considered adequate "cause" in law. Professor Mullan suggests[9] that in the absence of agreed procedures to determine if financial exigency exists (and, if it does, to determine which appointments should be terminated) a university might well have that right. He suggests that tenured appointments may be terminated for "matters having nothing to do with the qualities of the particular professor, but rather depending upon the overriding powers of the university government to manage the institution". Academic freedom is weakened to the extent that universities can by this means rid themselves of those who are perceived to be "deadwood" or "troublemakers". There are, unfortunately, some universities in Canada where such procedural protections are not yet satisfactory. But here are others such as Windsor and Bishop's where collective agreements give fair protection to the faculty.

Whether their appointments are governed by private contract or by collective agreement there are inherent threats to academic freedom arising from peer review. Professor Archie Malloch of McGill University and a former Chairman of the CAUT Academic Freedom and Tenure Committee put it nicely when he said, "We (faculty members) have the power to work the same kinds of injustice that were formerly the prerogative of Deans and Presidents."[10] Experience working with the CAUT Academic Freedom and Tenure Committee has provided numerous examples of the ingenious ways in which colleagues can be unfair to each other. Academic freedom must now be protected against the carelessness or willfulness of peers. These may be the anonymous peers who serve on national grant selection committees or the personal colleagues who serve on tenure or promotion committees. The threat from this direction is probably as great as that from autocratic administrators in years gone by or as that from governments or an ill-informed public may yet be.

Academic colleagues now have the power to recommend (by arguments more or less persuasive) that a colleague be denied tenure whose only fault may be that he or she is unpopular or whose approach to the discipline has fallen out of favour. The evaluation of academic performance is, after all, an inexact process and it is easy to allow inappropriate criteria to tip the balance one way or the other when the application of objective criteria makes a recommendation difficult. Once a recommendation has been made the members of the initiating committee have a vested interest in defending its validity. Only when there is an opportunity to review the substance of a recommendation is it possible to determine whether there has been bias or discrimination. Even then this may be difficult to do. Fortunately arbitrators have been prepared to consider the substance of cases, including tenure cases, and to reverse unfavourable decisions when they find cause to do so.

A number of other developments in some Canadian universities pose additional threats to tenure status. One of these is the process of periodic tenure review, a required

formal review at stated intervals after the award of tenure. Unsatisfactory evaluation may lead to dismissal charges. CAUT has generally opposed such periodic reviews because they are seen as the first step in replacing tenure by five year contracts. Such clauses have, however, found their way into a number of collective agreements and faculty handbooks although five year contracts have not as yet appeared.

Employment Relationships

Dismissal actions in the Canadian universities are still comparatively unusual. It is likely, of course, that unrecorded resignations occur as an alternative to undergoing a dismissal hearing. That there are not more dismissal actions is, I think, the result of the unwillingness of university administrations to appraise performance, to provide warnings where necessary, to collect appropriate evidence of inadequacy and to take action where warranted. There will, however, soon have been a sufficient number of dismissals to establish a standard of incompetence, persistent neglect of duties or unprofessional behaviour sufficiently serious to warrant termination. Can it be argued that academic freedom is strengthened when academic jurisprudence has established what does and what does not constitute cause for dismissal?

A considerable threat to academic freedom is the increasing tendency in universities to make limited-term appointments as an alternative to tenure track appointments. Such appointments, of course, provide universities with the "flexibility" which they feel they need to adjust faculty members when financial problems suggest the need to retrench. CAUT has long opposed the use of quotas on tenured or on tenurable positions. In some collective agreements the use of such appointments has been restricted by function, by numbers or by proportion of the salary budget allocated to them. In non-unionized universities it is much more difficult to restrict their use and a population of "gypsy" academics is created in consequence. It is difficult to persuade faculty members whose appointments last only a year or two and whose renewal is dependent often on the whim of colleagues that they have academic freedom.

This raises the question of whether only those who hold regular university appointments are entitled to academic due process. Is not the gypsy population mentioned above also entitled to the assurance that fair procedures will be used when new appointments are being made? Is not academic freedom threatened if a university makes an initial appointment in a restrictive, discriminatory or biased way?

The CAUT Academic Freedom and Tenure Committee has been concerned for some time about the number of complaints which come to it about unfairness in making new appointments. It is often alleged that the "old guard" in departments perpetuate their biases and prejudices in making new appointments and that lip service only is paid to fair-minded and objective criteria. A CAUT committee of inquiry in a particularly troublesome case has recently confirmed the allegations of a rejected applicant and has proposed a CAUT guideline to ensure fairness in making new appointments. Surely academic freedom is enhanced if procedures require that only appropriate

academic criteria are used in making appointments. That principle has, of course, been amended somewhat, on nationalist grounds, by the Canadian Government which now requires that preference be given in making university appointments to citizens or permanent residents. A similar regulation applies, as I understand, in the United States.

Threats to individual academic freedom, may arise from incidents of sexual harassment. Not without cause this matter has received a good deal of attention in the Canadian universities in the last several years. York University in Toronto is, I think, the first Canadian university to develop a code of conduct and procedures to be used when allegations of sexual harassment are made. While incidents of sexual harrassment are no doubt more common between male faculty members and female students, they can and do occur between men and women faculty colleagues. They may range from a subtle put-down to more explicit and unwelcome sexual overtures. When the incidents occur between members of the academic community the effect on the recipient of sexually harassing behaviour may be, in the words of the CAUT Guidelines on Professional Ethics relating to Sexual Harassment, ". . . to unreasonably interfere with a person's work or academic performance or create an intimidating, hostile or offensive working or academic environment." Surely behaviour that has this effect is a restriction on academic freedom. Two tenured faculty members have recently been dismissed in Canada for sexual harassment.[11]

Attacks on individual academic freedom may, of course, be mounted from outside the university. These differ somewhat from the examples given by Professor Horn of efforts to prevent faculty members from expressing their opinions on public issues. More subtle threats come these days from agencies of government, from the media and from representatives of the public.

The activities of the Royal Candian Mounted Police on Canadian university campuses provide an interesting example of the danger to individual academic freedom which can be imposed by government agencies. Since 1961 CAUT has been concerned about attempts to infiltrate and suppress allegedly radical groups in the Candian universities. Since 1963 there has been agreement with the federal government that there would be no general surveillance of students or faculty members and that the RCMP would conduct investigations on the campuses only when there were definite indications of individual involvement in breaches of the criminal code, in espionage or in subversive activities as defined in the Criminal Code. The 1981 report of the McDonald Royal Commission on the RCMP reveals that by 1967 the RCMP had subverted the agreement and, with the assistance of co-operative faculty members, were continuing surveillance of those who were judged to be campus radicals. The RCMP officers involved in this activity often did not appear to make a distinction between criminal subversive activity and legitimate political dissent. Reports on numerous faculty members and students found their way into RCMP files. Homosexual faculty members were treated in particularly unsympathetic and antagonistic ways. Since the publication of the report the CAUT has strongly urged the federal government to implement the recommendations of the McDonald Royal Commission which made proposals to curb RCMP activities on

university campuses.

On a number of occasions in recent months there have been media attacks on what is perceived to be the privileged position of university faculty members in Canada. These frequently evince a lack of understanding of the meaning of tenure and the nature of the job security which it provides. The impression is often given that tenure means absolute job security, that its only effect is to protect incompetent faculty members and that the public is poorly served by the continuation of tenure in the universities. Recent public comments by a syndicated columnist and a religious leader with a national reputation have revealed a lack of understanding of due process covering academic status decisions in the universities.

Some daily newspapers in the country have been critical of the traditions and customs in the universities. While the media is as entitled to report on university affairs as it is on the affairs on any other sector of society, the ill-informed basis for much of the criticism must be of concern. Difficult economic times have provoked a conservative mood. It is hard to escape the fear that such attacks will provoke broad public resentment of the cost necessary to maintain first class institutions.

Finally, let me turn to attacks on the academic freedom and the autonomy of the university as an institution. These may come from university governing bodies, from public special interest groups and from federal or provincial governments.

Since the report of the Duff-Berdahl Commission in 1966[12] there has been a dramatic improvement in the role which faculty members play in governing the academic affairs of their universities. Senates, the senior academic bodies within the Canadian universities, are now usually composed of a majority of elected faculty members and their authority in academic matters is seldom challenged. However, Boards of Governors, although they now often include a few token faculty members, are still largely composed of members appointed from the business and political communities and retain authority in fiscal matters. During the relatively affluent days of the 1960's and early 1970's Boards of Governors adopted relatively low profiles in the operation of the universities. The day-to-day operation was entrusted to appointed administrators and the Boards became essentially trustees. Restrictions in university funding have, however, resulted in a revitalized involvement of Boards of Governors in the affairs of the universities. So too has the rise of collective bargaining. This has been revealed by progressively more difficult faculty salary negotiations and by announcements of the dire consequences which will follow if faculty demands are met. Boards of Governors use threats of lay-offs both as a bargaining tool in negotiations with faculty and in efforts to persuade governments to provide more generous financial support. Financial problems leading to threats of retrenchment will bring Boards of Governors into more frequent conflict with academic Senates in the years ahead.

Although fundamentalist religious groups have so far been somewhat less active in Canada than in the United States, there

have already been efforts to restrict the use of particular books by Canadian and American authors in the high school curricula and suggestions that "creation science" should be accorded a place in the biology course of studies. Some of these efforts in the schools have been successful. I am not aware of any attempts by community or religious groups to restrict the curricula or course of studies in the universities although it seems only a matter of time until criticisms of "Godless" universities are voiced. In the expectation that attacks will be mounted on the educational system at all levels CAUT will be co-operating with teacher's groups across the country in the development of a program of action effectively to counter such conservative attacks.

Virtually all Canadian universities are publicly funded. Although some have substantial endowment funds they are not analagous to the "private" universities in the United States. Canadian universities operate, moreover, under provincial statutes. The number of degree-granting institutions is sufficiently small and standards are so comparable across the country that it has not been necessary to adopt accreditation procedures similar to those in use in the United States. However, a bill before the Federal Parliament governing the incorporation of business will, if passed, remove the authority of the Minister of Consumer and Corporate Affairs to refuse an application from any person or group wishing to incorporate a university and sell degrees which could be academically worthless. There will, henceforth, be no requirement that the applicants prove that they have the qualifications or the capacity to operate a university. It is felt that such organizations, if they become common, would debase the value of degrees awarded at genuine universities. It may be necessary to lobby for provincial statutes (education is a provincial responsibility under the Canadian Constitution), regulating the awarding of degrees. Alternatively, accrediting organizations may have to be formed.

Already, under present regulations, a "university" sponsored by the "Universal Life Church" in Modesto, California has been incorporated in Prince Edward Island. Homosexuals will not be permitted to join the staff according to Bishop Sam Datt Sharma, the founder of the "university." A fundamentalist Bible college, Trinity Western University, was chartered several years ago by the government of British Columbia. Members of faculty are expected to hold and advance the religious views of the sponsoring church group. It seems to be only a matter of time until CAUT receives a request from a faculty member at one of these institutions to assist with a grievance arising out of denial of academic freedom. These are, no doubt, old problems in the United States. They are, however, new in Canada. Such institutions if they appear in numbers will pose a threat to academic freedom.

Summary and Conclusions

There has been in Canada an assumption that a high degree of autonomy is necessary to preserve the independent character of the universities. For this reason provincial and federal governments have, over the years, preserved an arm's length relationship with universities. To this end direct operating grants from federal sources, once paid directly to the universities, are now paid in the form of "untied" transfer

payment to the provinces. Most provinces, in turn, have established independent advisory commissions to counsel them on year-by-year changes which should be made in the operating grants which go to the universities. The funds are often allocated on a formula basis. The number of students in the university and the courses in which they are enrolled are factors in determining total entitlement.

This system worked reasonably well in the 1960's and early 1970's when adequate year-by-year increases were provided. Recent developments have, however, given warning that university autonomy may be sharply curtailed. The federal legislation under which transfer payments are made to the provinces for post-secondary education expired at the end of March, 1982. The federal government and the provinces are engaged in a power struggle as each seeks to bring its expenditures under control, to obtain maximum public credit for the support that they give to the universities, and to blame the other for the difficulties the universities are having in making ends meet. Universities are the losers in that they are forced to operate on a year-to-year basis in an uncertain financial climate in which, for some, bankruptcy looms ever closer. University autonomy, and therefore academic freedom, are hostage to the unresolved bickering between the provinces and the federal government.

Among the provinces the most direct threat has occurred in Ontario where the government has indicated that it is prepared to introduce legislation to prevent universities from engaging in deficit financing and will provide for a public trustee to replace Boards of Governors which ignore this limitation on their powers. In some provinces a measure of control has already been exerted over the universities in academic matters. Public funding for new courses and programs has been dependent for some time either on the direct approval of the provincial ministry concerned or on the favourable recommendation of a "buffer" agency if one exists. There have also been freezes on building projects and other capital improvements in many provinces for the past several years.

Federal government policies may exert a direct and substantial influence on academic programs and research conducted in the universities. The government has, for example, made it clear that it feels there should be greater attention to manpower planning in the country in an effort to ensure that sufficient numbers of qualified people are available in the fields for which it is judged there will be a demand in the future. The implication is that the universities will become trade schools turning out specialists as required by the government. To ensure that this happens the government could, for example, fund the universities by making loans available to students prepared to undertake approved courses of studies.

The federal government is also able to influence, through the federal research granting agencies, the nature of research conducted in the universities. These agencies show an increasing tendency to make research funds available in the form of "strategic" grants for "mission" oriented research and to restrict funds for the sort of open-ended research which has been traditional in the universities. Autonomy is thus reduced

and academic freedom placed in jeopardy.

Governments exert a substantial influence on the affairs of the universities and inevitably on their freedom to function independently. No one would argue that a measure of public control on the expenditure of public funds is not appropriate. A challenge in the years ahead will be to develop funding procedures which provide the taxpayers with assurance that money is being wisely spent, while maintaining the ability of the universities to decide "who shall teach, who shall be taught and what shall be studied, taught and published", and which permit all these decisions to be made in reasonable security.

The concept of academic freedom is to some extent defined by the times and circumstances. Attempts by Board of Governors and politicians to restrain individual faculty comment on public issues have largely been replaced by the danger of restriction on freedom imposed by peer judgement. The rise of collective bargaining has, however, provided effective safeguards in many universities. These safeguards are backed up by arbitrators who can and do rule on matters of substance and restore or confirm faculty members in their posts. Though there may be in the future a more generalized restriction on university autonomy by government action, the academic community in Canada has become more effective in lobbying and has had some success in discrediting the more extreme enthusiasts for manpower planning.

FOOTNOTES

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11. A DECADE OF CAMPUS BARGAINING: AN OVERVIEW

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Introduction

This paper is a broad overview of collective bargaining with faculty in higher education. It concentrates on a review of the growth and decline of bargaining, gains and/or losses in faculty compensation, and the impact of collective bargaining on governance. I chose these three issues because I think some definitive things can be said based on 10-12 years of research and experience.

I leave for future comment more careful analyses of changes in legislation, developments in unit determination, bargainability and grievance and arbitration.

This paper concludes with five general observations about some of the lessons collective bargaining has taught us.

Extent of Collective Bargaining

The first collective bargaining contract for the faculty at a postsecondary institution was signed in 1963 at Milwaukee Technical Institute, a two-year institution in a district that also included elementary and secondary schools. The first strike at a postsecondary institution was at Henry Ford Community College in Michigan in 1966, the same year that the faculty at the Merchant Marine Academy became the first in a four-year institution to organize. The developments at the City University of New York, Central Michigan University and Southeastern Massachusetts University in 1968 and 1969 attracted substantial public attention as the first instances of faculty unionization at major four-year institutions.

Three major points can be made about the present and future status of collective bargaining in institutions of higher education, and these points have remained quite stable over the past decade. First, faculty collective bargaining is mainly a phenomenon of the public sector of higher education. According to the June 9, 1975 edition of the Chronicle of Higher Education, there were 385 campuses with unionized faculty. Of these, 331 or 86 percent were public institutions. Sixty percent of the total (231) were community

or junior colleges.

In the Fall of 1981 there were 737 campuses with unionized faculty but the percentages really did not change that much. Eighty-seven percent of these campuses (642) were from the public sector. Sixty-four percent of them (470) were community or junior colleges. In the independent sector, only 95 institutions had unionized faculty whereas in 45 cases the faculty at private institutions had voted not to unionize.

Second, the growth of faculty collective bargaining has closely paralleled the enactment of state collective bargaining laws. Between 1965 and 1972 faculty bargaining arose mostly in heavily populated and relatively industrialized states in the east and midwest that adopted enabling legislation before 1970. By 1973 there were 161 organized institutions in Massachusetts, Michigan, New Jersey, New York, and Pennsylvania, representing 79 percent of the organized institutions in the country at that time. Begin (1974a) documented a slow down in the growth of faculty bargaining during 1973, a pattern that continued in 1974 leading some observers to predict a decline in growth. A major reason for the apparent loss of momentum in 1973, however, had been the early proliferation of faculty bargaining units in the five states named above. Because 79 percent of the public institutions in those states had adopted collective bargaining by early 1973, little room was left for further growth.

Since that time, several states have passed enabling laws including, California, Washington, Oregon, Iowa, Florida, Maine, Connecticut and New Hampshire. In 1977-78 we predicted that approximately 42 percent of the public campuses would be organized by 1980 and that an "outside" percentage would be 50 percent (Mortimer and McConnell, 1978, pp. 51-52). The actual figures in 1981 were about 41-45 percent.

It is my feeling that after the California situation settles down, there will be very little growth left in the public sector unless there is a new wave of collective bargaining legislation in the remaining 23-24 states that do not now have appropriate legislation. (California is likely to add 20-30 more campuses to the count in 1982 - the 19-campus State University System plus a few more community colleges.) I do not expect to see a wave of public employee bargaining and therefore in my opinion, the growth of faculty bargaining has slowed down.

There is a development which bears some closer scrutiny by those interested in why the more prestigious universities have not chosen to unionize. For the most part the major state universities or flagship campuses have resisted collective bargaining efforts. Here I refer to such institutions as the University of California at Berkeley, the University of California at Los Angeles, the University of Colorado, Michigan State University, the University of Minnesota, the University of Nebraska at Lincoln, the University of Oregon, the Pennsylvania State University, the University of Pittsburgh. With few exceptions, those research-oriented campuses that are organized have been part of larger multicampus units and never had an opportunity to express their campus attitude about

faculty unionization.

I believe the "snob" appeal argument has been very effective for those people engaged in campaigns to persuade faculty that unionization "does not happen in good universities." It seems to me that the California situation could be a watershed on this argument. If the University of California at Berkeley and UCLA organize in the next year or two it may break the dam.

There is one other change in the milieu of postsecondary education in the last decade. A number of the universities and colleges that organized in the early 1970s did so before the administration had any feeling that such a development was less than inevitable. Beginning with the number of the early elections at places like the University of Miami, Syracuse and NYU, the administration began to take a more careful look at the extent to which they could express their views in any collective bargaining election. As of 1982, there are almost 100 institutions where the faculty have rejected collective bargaining in an election period. While there have not been any serious studies of those campaigns, since my 1975 piece (1975), I believe a significant factor in many of these rejections has been the administration's forthright campaign to persuade faculty that unionization was not appropriate for their campus. There is now a rather specific litany of steps that administrations can take to dissuade faculty in their organizing efforts and this fact may be an additional feature in keeping the institutions I mentioned above relatively free from unionization pressures.

Faculty Compensation

In the early 1970's there was a great debate among the advocates and opponents of faculty unionization as to its effect on faculty compensation. In 1977, Bob Birnbaum (1977) and Brown and Stone (1977) reported their findings on this topic at the meeting of this national center. Recent findings by my colleagues at Penn State are worth further discussion here since they now are based on eight years of data from 1970-71 through 1977-78.

Bob Birnbaum, who included both two- and four-year institutions in his sample, and Morgan and Kearney reported salary advantages in favor of unionized faculties. Brown and Stone reported no significant differences when regional differences were included. Leslie and Hu (1977) reported salary advantages for unionized faculty and, that when 1974-75 data are used, the size of the union compensation advantage increased with each year of unionization.

The work of Leslie-Hu has continued and the results were published last Spring (Guthrie-Morse, Leslie and Hu, 1981). The design is a matched-pairs regression and includes 30 unionized and 30 non-unionized four-year institutions.

One of the major findings of the new study is that 1974-75 seems to have been a watershed year for gains by unionized faculties. Since that time these union gains have decreased.

Over the eight-year period, unionized faculties achieved larger gains in six years but the non-union faculty gained on them in each of the last three years - 1975-76, 1976-77, and 1977-78. If one adjusts these data for local cost-of-living differences, the compensation advantage enjoyed by the unionized institutions almost disappears. (One must be careful in analyzing these data to realize that one is talking not about average compensation, but gains in compensation over the period. The faculty in non-union institutions still have broker average compensation than the unionized faculties.)

The second conclusion from the data is that the largest unionized gains appear to be made in the least complex institutions. The 1977-78 advantage for the least complex institutions was $1,484 in favor of the unionized ones whereas it turned into a disadvantage for unionized institutions in the more complex institutions.

It is also apparent that unionized faculty in private institutions have been paid more than non-unionized private faculty while the reverse is true in the public sector - unionized faculty in public institutions have been paid more than their colleagues in non-unionized environments.

A not-so-surprising finding relative to salary variability is that it is greater when the institutions report they use merit as part of their criterion for salary determination. Less than one-half of the unionized institutions in the sample use merit as a criterion where as over three-quarters of the non-unionized institutions do so.

A second observation about merit is worth quoting in some detail:

> A second major observation concerning merit is that the unionized institutions experienced many more changes in their salary procedures between 1968 and 1978 than did the non-union institutions. Fewer union institutions utilized the merit principle in awarding salary increases in 1978 than had done so in 1968. The figures were nearly constant in the non-union sector. Further, eight non-union institutions in each year utilized merit as the only salary increase principle whereas no union institutions did so in either year. Finally and surprisingly, the use of salary schedules is about equally common in the union and non-union sectors (p. 250).

This audience is well aware of the difficulty that higher education has experienced over the award of merit. There is little agreement as to what constitutes meritorious performance and as long as it is perceived to be under the discretion of administrators, it is natural, in my opinion, that faculty unions would attempt to lessen or eliminate its impact. Another factor in these findings, however, is the point that salary compensation during the latter half of the decade probably did not keep up with the cost of living and a number of people have pointed out that the argument for across-the-board as opposed to meritorious raises has been more

persuasive. The argument probably has turned into one of "relative depreviation" rather than the awarding of meritorious performance on the part of individuals.

It is also apparent that a number of unions have attempted some creative solutions to the idea of merit, such as the annual award for excellence in teaching that are common in the Pennsylvania State College System. These awards take the form of one-time bonuses.

Senates and Collective Bargaining

Most institutions where collective bargaining has taken place did not have traditions of strong faculty participation in governance. It is, therefore, in my view, unrealistic to argue that collective bargaining adversely affects senates if the latter mechanisms were formed just before or during a unionization campaign. The rhetoric on senates in bargaining was, if you remember, that it would be very difficult for the two to co-exist in a given institution. There was a widespread belief that senates in collective bargaining were contradictory rather than complimentary. Comments about senates by the leaders of faculty unions were almost uniformly critical if not derisive. My favorite quote follows:

> Given a benign administration, a relaxed political climate, a liberal community, a quiescent student body, a president uninterested in the day-to-day business of the institution, academic senates have been able to contribute meaningfully to the making of academic policy (Solomon, 1974, p. 1).

In 1975 Garbarino reported that the most common relationship between unions and senates had been cooperation or at a minimum co-existence. He indicated that cooperation had been the dominant style at single campus and main branch institutions where administrator structures are simple and the unions are essentially guild unions of the tenure-eligible faculty. Senates and unions were least cooperative and most competitive at the system-wide level and in large, complex multi-campus systems with comprehensive bargaining units. Those systems included the majority of all unionized faculty. Even in the large systems such as the state and city universities in New York, the relationship between local campus senates and the local branches of the union are often quite cooperative.

In 1974, Jim Begin reported as follows: (1974b, p. 584)

> To date, none of the four-year institutions which have been bargaining have reported that faculty senates have ceased to operate, including those institutions that have been organized the longest, for example, Saint John's University, Central Michigan University, City University of New York, State University of New York, Southeastern Massachusetts University, the

New Jersey State Colleges and Rutgers University. In fact, at Central Michigan University and Rutgers University there is some feeling on the part of the administration that the senates are participating more actively in policy deliberation than before the on-set of collective bargaining.

In our own study Walter Gershenfeld and I (1976) found that two of the fourteen Pennsylvania State Colleges dissolved their senates soon after the adoption of collective bargaining and that four of the senates played only a social or clerical role. The activity of the remaining eight tended to be confined to curriculum and student affairs.

Kemerer and Baldridge (1981) report on a comparison of surveys done in 1974 and 1979. They report that the dual track concept is alive and well in four-year institutions. Senates concern themselves with academic matters while unions concentrate on economic issues and the demarcation lines are clearer in 1979 than in 1974 (p. 257). (It should be remembered that they report the perceptions of presidents and union chairpersons.)

Presidents report an increase in senate influence in such academic areas as degree requirements, admissions and curriculum while unions increased their influence over such economic matters as faculty salaries and working conditions. Union chairpersons also see senates increasing their influence in several areas but notice little change in union influence. The important point is that these responses tend to be consistent between 1974 and 1979.

Senates appeared to have gained some influence over long range planning while union influence on that area remains quite low. At both the four-year and two-year campuses respondents rated union influence highest over salary matters - as one would expect.

In a 1982 article, Barbara Lee reports that a search of 142 contracts in four-year colleges available in 1980 found 58 contracts with some form of protection for non-union faculty governance groups. She reports that fewer than one-third of these 58 agreements included protection for the senate. The protection ranged from merely mentioning the senate to incorporating the senate charter or bylaws in the agreement. More than half of the agreements that included the senate listed its responsibilities. In several the union reserved its rights to exclusively represent the faculty on salaries, fringe benefits, and other terms and conditions of employment (p. 74).

One of Lee's more interesting findings is reported for the eight institutions in which she conducted a more careful analysis. It supports what in the early 1970's a number of people were predicting would be an effective strategy for unions.

> Although the two governance "tracks" were formally separate at the eight colleges

> surveyed, examination of informal governance structures revealed substantial overlap between the leadership of senates and unions. At five of the colleges, the senate leader interviewed for this study had recently held a leadership position in the union (three chaired union committees, one was a negotiator and one had been president of the union). Most of the union presidents interviewed for this study were concurrently serving on non-union governance committees, not by virtue of their office, but because they were elected to represent their faculty colleagues in the governance process (p. 81).

Overlapping membership, of course, is one of the fundamental characteristics of oligarchies in academe. The union leaders in this study insisted that their roles as members of non-union governance committees were as representatives of a faculty constituency not as an advocate for the union's interest.

Lee's evidence also supports an earlier generalization that cooperation tends to be effective when there is a lack of conflict between the union and the administration. She reports that some of the early tensions and clashes of union and administration have evolved into more stable relationships as the parties adjust to their roles. In at least half of the colleges new administrators had arrived after unionization and thus were not tainted by the hostility that might have been directed toward their predecessors. In seven of the eight colleges she surveyed it appeared that all three parties - the union, the senate, and the administration - had made concessions in order to avoid conflict. The administration, rather than limiting its dealings with the union to negotiating sessions, or to contractually required meet and discuss sessions talked frequently and informally with union leaders.

It is also clear that senates have ceded some of their power over faculty welfare issues to the union - probably in exchange for becoming the voice of the faculty in academic policy matters. Of course, senates have had no choice over the ceding of such authority in matters of salaries and other mandatory subjects of bargaining.

In 1978 Mortimer and McConnell offered five things we thought to be important when judging the likely impact of collective bargaining on senates and other governance structures. I repeat them here as a way to summarize this matter.

First, where unionization was a response to high level of intra-faculty conflict, we expected senate influence would diminish. That is, if unionization represented a revolt of the young turks against the old guard we believe the functional authority of senates was likely to erode when pitted against the formal authority of the union.

Second, the broader the bargaining unit the greater the diminution of senate influence. A broad bargaining unit is

likely to represent non-teaching professionals than others who are not eligible for senate membership. For such people the only mechanism for participation in campus governance tended to be a union.

Third, the broader the scope of the bargaining unit the greater the dimimution of senate influence. It has been very clear that where very broad contracts have been negotiated they have entered into areas which have traditionally been what one would expect to be under the purview of the senate.

Fourth, the viability of senate influence under collective bargaining is directly related to its viability before bargaining. The most that can reasonably be said about the impact of collective bargaining is that it may have hindered the development of senates in those institutions which did not have them prior to 1970.

Fifth, the senate and the union will tend to be mutually supportive when the senate has a tradition of effective operation and there is relatively little conflict between the faculty and the administration. In situations where administrations have sought to dismiss or retrench tenured faculty members, one would expect the influence of the senate to be minimized substantially.

I have found very little in the existing literature to make me revise my opinion of the findings of Begin, Gershenfeld and Mortimer in my own research throughout the decade of the 1970s.

General Observations

1. Good legal advice is often bad academic advice. Several administrations have relied excessively on legal advice to the detriment of their academic judgement. In one case the administration ordered all deans to cease participating in the senate immediately after a collective bargaining election. In its zeal to avoid a potential unfair labor practice, this administration exacerbated the conflict it was trying to avoid!

2. It is impossible to separate the effects of collective bargaining from the effects of all the other environmental turbulence higher education has experienced in the last 10 to 12 years. These other factors include open admission, affirmative action, collective bargaining legislation, the increased influence of state governments and coordinating boards, double digit inflation and increased costs of mandated programs like retirement programs and social security.

3. The impact of collective bargaining has been a function of conditions ante-bargaining. Collective bargaining has built on established patterns.

4. In individual instances, one can find evidence to legitimate almost any argument. In spite of the evidence that merit does not fare well under collective bargaining, there are

cases where it does. In spite of the evidence that senates and unions can co-exist, there are cases where they do not. Collective bargaining, like other governing arrangements in higher education is very flexible.

5. The greatest mistake made by the parties in collective bargaining has been to go into the process without a clear sense of relative priorities. Administrators are only now coming to an understanding of what they believe to be the appropriate role of the union in the entire sphere of campus governance issues. Unions have begun to realize the limits of their effectiveness in non-economic matters.

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12. THE NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION: THE FIRST TEN YEARS - PART I

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The Decennium Conference of the National Center gives us an opportunity to explore several of the seminal questions originally raised at the First Annual Conference, as well as to assess the role that the Baruch Center has played in the study of academic collective bargaining over the past ten years.

On examination of the brochure setting forth the mission of the National Center reveals how close the Center has come to meeting the original goals. The mandate of the Center included the establishment of 1) a national databank on collective bargaining in higher education, 2) serve as an information clearinghouse with suitable media for information circulation and exchange, including a periodical newsletter, annual journal and special bulletins on significant developments, 3) the development of an ongoing program of interdisciplinary research and analysis on issues in the field, 4) function as a resource center for consultation on immediate, individual problems in collective bargaining training for educational leaders through seminars, institutes and various other programs.

With respect to the national databank, NCSCBHEP's Contract Library includes agreements from all organized institutions in the United States and Canada. The majority of our contract file has been computerized and serves as a depository for collective bargaining agreements. Our Newsletters, Monographs and Annual Proceedings can be found in over a thousand different university and college libraries. Our research has been cited by various authors, scholars, the United States Supreme Court and legislators.

In terms of training, we have reached over three thousand individuals engaged in academic collective bargaining. Clearly, our services have been well received and well subscribed to.

In addition to the above NCSCBHEP is proud of the role it has played in providing an ecumenical forum for the academic collective bargaining community; a setting in which representatives of labor and management can meet in a non-adversarial arena to discuss issues of mutual concern.

The purposes of this paper then is to look at those critical issues that have confronted academic collective bargaining during the past decade and to share some views with respect to them.

Collective bargaining in higher education is now firmly established as more than 400 colleges and universities embracing over 750 campuses are organized into collective bargaining relationships. Over 160,000 faculty are currently in bargaining units and although the growth rate of unionization has somewhat diminished in recent years, academic collective bargaining can no longer be considered as an isolated phenomena.

At the First Annual Conference, Sidney Hook, the noted philosopher, speculated as to where collective bargaining in academe might eventually lead. "There is every likelihood that collective bargaining is the wave of the academic future." He based his predictions on the large number of instructors in the lower and junior ranks, the spectre of financial limitations, the halt in institutional expansion that made professors more conscious of tenure, the attack on tenure itself from many different sources and the impressive economic gains made by teachers in community colleges. The choice advocated by Hook was "not between an acceptance or rejection of the principle of collective bargaining but between the different forms of collective bargaining. Since contracts in higher education are written as distinct from most labor contracts, not for the entire industry but for each university system, we must ask, under what form of collective bargaining can the academic mission best be preserved and strengthened?" We are still asking that question today but we are fully cognizant of the diversity and individual needs of each institution. Master contracts are not advocated and, indeed, the various national unions have not usurped the autonomy of their locals.

Hook also addressed the issue of academic standards and quality in the collective bargaining relationship. He was concerned with "the attempt to use the mechanisms of due process which legitimately protect scholars..." and its relationship to job security. Hook returned to speak at the Seventh Annual Conference and stated that "the improvement in the degree of shared authority between faculties and administrations in private higher education, observable in the last decade or so, tends to be an obstacle to the acceptance of collective bargaining. But it seems to me indisputable that the main cause for the growth of that shared authority is the very existence of the collective bargaining movement and sentiment, and the possibility, some would say fear, among administrations in some institutions that faculties would vote

for it." Hook also reexamined the issues of excellence, tenure and the overall academic mission and concluded that "the request for the extension of faculty input and decisions in these areas, (budgetary concerns), particularly in times of increasing inflation, seems to me to be the most promising approach in winning support for the principles of collective bargaining on the campuses of private universities."

Robert Kibbee, the Chancellor of the City University of New York, also speaking at the First Annual Conference, expressed his concern over the question of unit determination. Kibbee's thoughts are extremely signficant today, in light of Yeshiva. The issue of the appropriate unit is still a major question. Kibbee also addressed the role of students in the collective bargaining process and the institutionalization of the union in the process of administration of the collective agreement. It is interesting to note that although the issue of the student in the bargaining process has been fairly well developed, students continue to have little if any input whatsoever. The concept underlying this issue is that students are not part of the employment relationship and, therefore, should not be included in the collective bargaining process.

Labor law has often been a crucial topic at Center Conferences. At the Second Annual Conference, Ralph Kennedy, a member of the National Labor Relations Board, discussed the thinking of the Board with respect to the post-Cornell cases. "I think that it is correct to observe that in post-Cornell cases, the current Board members are in substantial agreement as to the ultimate goal to be achived--namely, the establishment of a framework within which a rational system of union representation and collective bargaining may operate; a framework which will provide faculty members with a meaningful voice in determining their conditions of employment..."

Donald Zimmerman, a member of the present National Labor Relations Board, addressed this Tenth Annual Conference. It is apparent from his remarks that Member Kennedy's goal is further from being reached today than it was nearly a decade ago. One reads Kennedy's closing remarks with a degree of perplexity when considering the current status of Yeshiva litigation. "On some issues, the current Board members appear to be in relative agreement. The collective status of faculty members as employees rather than supervisors, managerial employees or independent contractors is one example." Thus, it appears that the Board in the early '70's differed substantially from the current Board in view of Yeshiva.

Joseph Garbarino, Director of the Faculty Unionism Project at Berkeley, addressed the Third Annual Conference on the topic of governance. "...Few of the potential affects of faculty unionism in higher education have attracted more attention than the changes in collective bargaining is expected to ring to academic governance." Garbarino cited two propositions in support of this argument: 1) faculty unionism has increased the effectiveness of senates as vehicles of faculty participation in governance dramatically; and 2) in organized institutions, the most common form of relationship between senates and unions today is one of cooperation, often guarded cooperation nevertheless. Two versions of collegiality were offered; a) the traditional or administrative version and b) the new emerging version referred to as the union version.

Garbarino viewed faculty bargaining as "another form of academic governance. It is one that replaced custom with contract, collegial consensus with majority rule, consultive committees with bargaining teams, and continuous discussion of discreet issues with periodic open-ended constitutional conventions." The issue of governance has been addressed at numerous other conferences. What has evolved over the years is a formulation of the shared governance approach at organized institutions where the union and senate reached a consensus, often as the result of intra-faculty bargaining.

Margaret Chandler, Professor of Business at Columbia University and a founding member of the Center's National Advisory Committee, has studied the question of management rights in higher education and the question of what happens to such rights during the bargaining process. "Although academic collective bargainers might have abandoned management rights clauses as a ceremonial gesture...tradition prevails, as over seventy percent of collective bargaining agreements contain such clauses." Chandler, along with the Daniel J. Julius, authored the well-received National Center Monograph, Faculty vs. Administration, Rights and Issues in Academic Collective Bargaining. Chandler and Julius examined the sharing of authority after collective bargaining has taken place on campuses and constructed a scaling method by which faculty agent penetration of management's functions were measured. Chandler has frequently addressed the Center's meetings and it is in the management rights area that many of the Center's studies have been focused.

Seymour Lipset of the Hoover Institution at Sanford University discussed the results of the now famous Ladd and Lipset Studies at the Fourth Annual Conference. The Ladd and Lipset survey, originally commissioned by the Carnegie Commission in 1969 and repeated in the ACH Study report of 1973, attempted to measure the support for academic collective bargaining on campuses. Lipset also surveyed the issue of strikes and choice of agent. One major correlate and a result of these surveys was the relationship of attitude to collective bargaining to socio-political views. Not one Tier 1 University, (Tier 1, of course, being a subjective choice), has chosen, at this point to engage in academic collective bargaining, a point addressed by Lipset and later by Hook.

Annual conferences such as those referred to above, have been used by researchers engaged in the study of collective bargaining in higher education as a source of population samples. While not originally envisioned as a major purpose of such meetings, the results of conference surveys have served researchers well.

J. Victor Baldridge of California State University at Fresno, speaking at the Fourth Annual Conference, suggested that while the fear of administrative impotence was widespread on unionized campuses, the evidence gathered in his research showed that faculty collective bargaining actually afforded greater power to certain administratrive components. While he questioned a net decline of administrative power at unionized schools, he did illustrate that the locus of decision-making within the administrative hierarchy changed. Due to the increased role of economics in labor relations, Baldridge predicted greater trustee involvement in the bargaining

process. Baldridge's analysis of collective bargaining within large state systems reveals that campus presidents serve the unusual role of middle management. The survey data revealed that presidents of unionized campuses "within state systems see their power divided between faculty unions and system management." The difficult decisions are made at the central administrative level and thus, the local campus president is often placed between the unionized group and central headquarters. Baldridge also predicted that outside neutral arbitrators would play an increasing role in the collective bargaining process. Baldridge's study is an extremely valuable contribution to academic collective bargaining and the results should be periodically reexamined.

Other experts in Higher Education Collective Bargaining, Irvin Sobol and James Durham, addressed the issue of productivity at the Sixth Annual Conference. Sobol predicted that productivity was "...the visual tip of a much larger iceberg dealing with retrenchment, the proportion of part-time to full-time faculty, promotion and tenure, funding of academic units and, indirectly, academic salaries. The National Center's monograph on Workload and Productivity updated much of Sobol's earlier work and indeed, we are indebted to Professor Sobol for his early vision into what has now become the major issues of the 1980's.

Durham questioned whether or not productivity can be measured in an objective manner, a concern shared by many engaged in collective bargaining. While it is true that the impact of the accountability movement has been difficult to ascertain, it is clear that cutback management has forced us to reexamine the quantitative aspects associated with the process.

Yeshiva was introduced to us at the Seventh Annual Conference. The attorneys who argued the case before the 2nd Circuit Court of Appeals in New York appeared to restate their points and discuss the decision. No one at the time could predict either the persuasive effect of Yeshiva on higher education collective bargaining, nor that it would serve as the linchpin tying annual conferences together around one ominious issue.

At the Seventh Annual Conference, Sidney Hook reexamined his original premise offered at the First Annual Conference and, along with Albert Shanker, President of the American Federation of Teachers and David Newton of Long Island University gave us interesting perspectives on alternatives to collective bargaining. The Seventh Annual Conference also reexamined such traditional questions as scope of bargaining, unit determination, and the status of academic tenure.

"A Retrospective and Prospective Look at Campus Bargaining in the Eighties" was the theme of the Eighth Annual Conference. It was at this conference that Aaron Levenstein first presented his analysis of Yeshiva, an interpretation that has received wide acclaim. John Silber, the President of Boston University was the luncheon speaker and delivered an address that challenged the role of unions in today's universities.

It was also at the Eighth Annual Conference that we begun to receive a series of updates on the status of collective bargaining in California. Other highlights of the Eighth Annual Conference included an updating by Margaret Chandler and Daniel Julius on their work in management rights and the introduction of a new concept entitled "Creative Academic Bargaining" by Robert Birnbaum of Columbia University. Birnbaum's major thesis was "...that neither compromise nor competition is a constructive means of managing conflict in academic bargaining, and that groups can more fully achieve their own goals not by defeating other groups or 'splitting the difference' with them, but by working together towards mutually acceptable solutions." His suggestions included allowing members of one bargaining team to choose members of the other bargaining team, increasing the use of third parties from the outset of bargaining, revision of the bargaining structure and greater reliance on dual governance.

The Ninth Annual Conference provided a forum for representatives the National Labor Organization, AAUP, AFT and NEA, to explore the issue of union legislative and political cooperation in the 1980's. While there were those who were opposed to this open exchange of ideas, nevertheless, we believe that by making this forum available, we served a major purpose.

The issue of disclosure of committee votes came under scrutiny in the 1980's. James Dinnan, of the University of Georgia, discussed his experiences in having been found guilty of contempt by the federal district court judge for his refusal to reveal his vote on a tenure committee. Although Dinnan's views were questioned by conference participants in the labor side, his willingness to enter into an open dialogue with Aaron Levenstein on this topic was significant. As Levenstein said, "Secrecy of decisionmaking is incompatible with due process and violates the right of confrontation...The secrecy principle violates good management. How are you going to hold those who make personnel decisions accountable unless there is knowledge of what they said and did in making their decision?"

At this Decennium Conference, we are reviewing and exploring several of these issues again, we find ourselves at the crossroads. Examination of the program reveals that while we have progressed in many areas, we are still reexamining seminal issues. Attacks on academic freedom, and campus unionization are appearing with greater frequency. We are questioning both the use and abuse of part-timers, the applicability of the industrial model to academic collective bargaining and the entire issue of academic standards in unionized settings.

It is clear that we have much work ahead of us at future conferences. No one is predicting the demise of collective bargaining in higher education although its growth and continued existence in its present form are under severe attack. We at the Center will endeavor to maintain our Yeshivawatch and provide the necessary data base to keep abreast of these and other relevant legal decisions. The status of collective bargaining in California will also be closely monitored. It is clear that the faculty at California State University will unionize as the challenged ballots have been held to be determinative. Another threshold issues that

we will be examining in the future is the potential for increased cooperation and merger of unions along the lines of the recent affiliation at the City University of New York between the Professional Staff Congress and the AAUP and the joint affiliation between the NEA and AAUP in California.

Will collective bargaining continue to grow? Is new legislation likely? Answers to these questions are difficult to predict; the only certainty being that those engaged in the process have a need for a broader information and knowlege basis. We hope, during the next ten years, to fill this need and to invite you all back to celebrate with us our Twentieth Annual Conference.

13. THE NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION: THE FIRST TEN YEARS - PART II

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Baruch College, CUNY

This assemblage of greybeards, shaved and unshaved, has been asked to take a retrospective look at the ten years of the National Center's existence. As in all social sciences, of which we are a branch, the ultimate test is predictive validity. Have our predictions conformed to the reality that finally emerged?

It has been a mixed bag, of course. When we started out, we had a set of worries. The question is whether we worried about the right things. A glance back at our nation's history is instructive: it shows how people worrying about issues that seem the ultimate determinant of national existence but then seem irrelevant. Tell me, how intensely do you feel about the establishment of a national bank, so hotly debated in the days of Andrew Jackson? Where do you stand on the issue of free silver and how determined are you that humanity shall not be crucified upon a cross of gold? At one time you could win the nomination of the Democratic Party on that issue. And, what is your position on the Smoot-Hawley Act? The fact is that the burning questions of yesterday leave us completely cold today.

We worry about the wrong things. They tell me more students die of worrying than die of hard work. That's because more students worry than do hard work. In my last class, when I was saying in effect farewell to the classroom on being promoted to professor emeritus, I asked my students what were the most worrisome questions for humanity today. On youngster said: "The big problem is population growth. What is going to happen, Professor, when we have so many people on earth that there will be standing room only? I told him not to worry, that when boys and girls no longer have room to lie down, the

problem will take care of itself.

The Fears and the Remedies

The key factor for us, it seems to me, is whether we who have been concerned with collective bargaining in higher education were worrying about the right things. Let's look at some of them.

When faculty began to unionize we were told that the effect would be a tremendous rift between administration and faculty, that they would no longer be able to work together, that the ultimate consequence must be the transformation of the groves of academe into the fields of Armageddon. The assumption was that ten years thereafter faculty and administration would not be talking to each other. They're still talking.

We were told that ten years after the advent of the unions, the universities would be in economic difficulties. Well, economic difficulties have come -- but who would say the unions are the prime, or even a major cause of our present plight?

We were told that collective bargaining would foreclose collegiality and would destroy faculty senates. We heard some data on that in this morning's session. Not all of you will agree with my conclusion that collegiality was never very much of a reality, that personnel decisions which were supposed to be suffused with collegiality were more often than not the product of bias, politics and all the other factors that go into such decisions elsewhere. My own judgment -- again I acknowledge that this will be debated -- is that greater fairness, and hence more collegiality, now exists under a system that allows for due process through the medium of union-negotiated grievance procedures.

Erosion of Standards?

But the most serious prediction was that collective bargaining would result in the corruption of academic standards. I recall attending a lecture by David Riesman at the Harvard Club, just a few weeks after the City University of New York signed its first contracts with the two contending faculty unions, since merged into the Professional Staff Congress. He announced flatly that, now that collective bargaining had arrived in CUNY, a serious deterioration had occurred in that once distinguished faculty. You see, it took only a few weeks. When I chided him for his rush to judgment, without awaiting any data, he receded somewhat from a sociology that was neither inner-directed nor outer-directed but simply misdirected.

I say "misdirected" because, in my judgment, there is indeed a real threat to academic standards. In any kind of enterprise, when there is a cutting back in economic rewards we witness a decline in job satisfaction and a consequent decline in performance. More often than not this is occasioned by the

fact that competent people turn to other activities rather than accept society's refusal to provide adequate compensation.

This, in my opinion, is what happened to the fears raised by those who were cynical about collective bargaining. Of course there have been negatives, as there are with all human institutions. You may recall Mencken's definition of a cynic: a fellow who whenever he smells flowers looks for the coffin. The pessimists among us saw danger -- but it was coming from a different direction. The enemy was to be found in the ranks of those who oppose education per se, who are intent on cutting expenditures for all forms of education.

In comparison with that danger, the negatives in collective bargaining are negligible. To be sure, unionization does mean a diversion of some faculty energies from teaching and research to the work of maintaining an organization, participating in negotiations, implementing a contract, and so on. It might even be argued that there is some loss of faculty quality in that the best members of the faculty may be tempted to accept positions of leadership in the collective bargaining process. But that is not a new problem: we have seen brilliant teachers tempted into accepting higher-paid jobs in administration.

Maintaining Quality

In the last analysis, what is it that gives us high-quality performance in any field? As a teacher of personnel administration, I have no difficulty listing the preconditions:

Number one is clarity of standards. Looking over the last ten years, I think I can make a good case for the view that collective bargaining has required administration as well as faculty to do a better job of defining standards, spelling out the criteria by which faculty is to be judged.

Secondly, implementing those standards requires proper preparation and continued training. Here again, collective bargaining agreements, as I have read them, frequently require the allocation of funds for such purposes and the setting up of suitable facilities for upgrading performance.

Thirdly, we must give administrators their due: the quality of supervision is a major factor in the maintenance of quality of performance. Here, too, collective bargaining has introduced procedures that compel better supervision and review of faculty behavior. (Incidentally, in the academic world we do not appear to lack for supervisors. No less an authority than the U.S. Supreme Court has declared that every faculty member is a manager, though some of us have difficulty understanding how it is possible to have all chiefs and no Indians, all managers and nobody who is managed.)

The ultimate factor in assuring quality, however, is motivation. Incentives matter in the academic world as in industry generally. The incentives are economic reward and

psychic income. Studies by industrial and organizational behavior psychologists have proved that all of us are interested in both types of incentive. Many decades have gone by since Kurt Lewin and his associates in the Research Center for Group Dynamics at M.I.T. demonstrated that job satisfaction and creative performance come out of allowing a greater measure of participation, a greater degree of autonomy. In my judgment, these are the very things that collective bargaining in higher education tends to further.

An interesting question was raised this morning by Gene Maeroff. Apparently he has no difficulty in recognizing what others get out of collective bargaining, but what -- he asks -- do the students gain? What they gain is the opportunity to study under a faculty that is enjoying job satisfaction; as a result, they get a better quality education.

Portents of Trouble

My conclusion, then, is that in the past we often worried about the wrong things. Our major mistake was that we failed to worry about the really big problem that developed. I know of nobody -- literally nobody -- who worried about the possibility that the Supreme Court might decide to isolate the academic community from the realities of the economic world in which faculty must live and deny to faculty the equal protection of the laws.

The completely unexpected Yeshiva decision has done considerable damage to faculties in private institutions. I am not ready to agree with some of my colleagues who believe that eventually the Yeshiva principle will be extended by judicial or legislative process to the public institutions. True, there is a great irony in that, at the present moment, faculty in public institutions have greater legal rights than those in the private sector -- an anomaly that never before existed in the history of collective bargaining. Even where legislatures are minded to apply Yeshiva to state campuses, the mills of the state capitols grind so slowly that we can expect Yeshiva to be modified or ultimately reversed by a more realistic Court before public employment relations acts are amended to exclude faculty.

But the most important development that we did not anticipate is the period of setback that the labor movement in general is now experiencing. This obviously must have an impact on the prospects of unionization in higher education. The next few years, particularly with a hostile administration in Washington, will be very difficult for labor. Even with a sympathetic administration, the economic problems of our society would create difficulties for unions.

The Status of the Labor Movement

We must avoid superficiality, however, in probing the portents. I have listened to a number of comments made at this conference which, in my judgment, reflect a misreading of labor history in the United States. For instance, it was said this morning, "Look at what has happened to the United Auto

Workers. That powerful, militant union has had to retreat, accept paycuts and surrender many of its past gains under the impact of the recession and the competition from abroad. We are asked to believe that such will be the fate of the labor movement as a whole.

This is not the way I read the record. Let me cite the case of a union that once dominated the headlines, whose leader was the outstanding labor figure in his time. Back in 1945, Alfred Knopf published a book of mine called "Labor Today and Tomorrow." It dealt with labor's role in World War II and predicted -- I think fairly presciently -- what was about to happen in the postwar period. Its focus necessarily was on the United Mine Workers of America and its spokesman John L. Lewis. He and it were the dynamo behind the development of the present labor movement; they set things in motion that created the Congress of Industrial Organizations and shaped the labor movement in the direction of industrial unionism and the organization, for the first time, of the mass production industries.

Today the UMW, once the powerhouse of unionization, has shrunk to a quarter of its former size. It is no longer the policy pace-setter of the American labor movement. But did that mean that labor's sun had set or even that it had gone into eclipse?

One of the errors in historical analysis is what we can call the Recency Effect. A contemporary event seems to carry greater weight in our consciousness simply by virtue of its currency. If you had looked at the American labor movement in 1928 when Herbert Hoover was elected President, you might very well have concluded that it had no future whatsoever. Its membership, under the impact of Coolidge prosperity, had shrunk to little more than 3 million. In 1928 who would have dared to predict the upsurge of unionization that occurred in the 1930s and '40s?

We are all conscious of the political and economic atmosphere that prevails now. But I suggest that the historical trends will reassert themselves. The factors that led to unionism in the United States will continue to operate. They will be felt in the university as well as in industry -- the sense of legitimate grievance, the need to make oneself heard concerning economic reward, the desire to influence the conditions under which work is performed. Indeed, as the economic plight of higher education deepens, the pressure for such participation in decision making will grow greater.

Toward Cooperation

Moreover, as government attempts to cut back on the nation's educational budget, it will become imperative that campus administration join hands with faculty organizations and with a sympathetic labor movement to create counterpressure. What may have seemed like an adversarial relationship in the past, it will be clear, must become a more cooperative one.

We are right in worrying about what is happening in our

national life. Political administrations often do their worst in the legacy they leave behind after they depart from office. The worst aspect of the Nixon presidency, it may turn out, is the kind of justices it installed in the Supreme Court, and the same is likely to be true of the Reagan administration. In addition, we must be concerned with the destructive legacy that will be left as a result of the curtailments in education; the loss to the nation will be apparent years hence when we experience a shortage of competent engineers, scientists, technicians, sociologists, philosophers, economists, humanists. The theory of the Reagan administration is that education is an aspect of the welfare state; the truth is that it is an aspect of industrial society and even more accurately, the very heart of a postindustrial society.

Benjamin Franklin once said that the only thing more expensive than education is ignorance. If education is to be protected, then faculty organization must be strong and administration must make common cause with in the effort to safeguard the schools and colleges of the land.

Let me say one thing more. It is in connection with the National Center itself. I have had the privilege of serving with it for ten years, ever since its establishment. It is unfortunate that Maurice Benewitz, its first director, could not be with us today. He would certainly have added a special note of controversy and sparkle to our review of the decade. When Clyde Wingfield, the then president of Baruch College, authorized the creation of the Center, he like the rest of us was concerned that it should be completely objective. Wisely he recognized that true neutrality could be achieved not by a bland, above-the battle approach but only by assuring that all points of view would be heard. Our staffing included proponents of management and of unionism as well as men and women involved in the practice of arbitration and mediation. As one who represented a union point of view, I am proud to have served with Maurice, with Tom Mannix, Ted Lang and Joel Douglas. Of course there were occasions of heated controversy, but out of the exchanges came a sense of affection based on the knowledge that we are all working toward the same end -- the enhancement of education and its greater utility for our society.